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No. 82 -

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROSCOE HOWARD, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
FIFTH APPELLATE DISTRICT

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QUESTION PRESENTED

When the police have probable cause to arrest a suspect, are Miranda warnings required when that suspect voluntarily appears at a police station and confesses to a crime during a short interview in which no "indicia of arrest" are present and after which the suspect is allowed to leave the station?

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

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OPINION BELOW

The opinion of the California Court of Appeal, Fifth Appellate District, an unpublished 1982 decision numbered 5 Crim. 5181, appears as Appendix "A" to this Petition.

JURISDICTION

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fifth Appellate District, which was entered in this proceeding on July 16, 1982. The Court of Appeal denied respondent's petition for rehearing on August 5, 1982 (Appendix "B"). The decision became final as to that court on August 15, 1982 (Rules 24(a) and 28, California Rules of Court). The California Supreme Court denied the People's petition for hearing on September 29, 1982 (Appendix "C"). The remittitur issued on October 1, 1982 (Appendix "D").

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

STATEMENT OF THE CASE

A. Proceedings in the State Court

Respondent Howard was convicted by jury in the Superior Court of the State of California, in and for the County of Tulare of crimes in two counts: first degree murder with one special circumstance (attempted robbery) and attempted robbery. In conjunction with both counts, the jury found that a principal was armed with a firearm. (Cal. Pen. Code, §§ 187, 190.2(a)(17)(i), 211, 664, and 12022(a).) (CT 116-117, 204-206).

Upon conviction, the Superior Court committed respondent Howard to life imprisonment without the possibility of parole with a concurrent sentence of two years for attempted robbery

and one year for the firearm enhancement. (CT 209-212.)

The Court of Appeal of the State of California, Fifth Appellate District, by unpublished decision filed July 16, 1982, reversed respondent's judgment of conviction on all counts. The State Court held that respondent was not properly advised of his constitutional rights pursuant to Miranda v. Arizona (1966) 384 U.S. 436 prior to making a confession on February 21, 1980. (Appendix "A".)

The respondent's petition for rehearing was denied on August 5, 1982. (Appendix "B".) A petition for hearing was denied by the California Supreme Court on September 29, 1982 (Appendix "C".)

B. Statement of the Facts

Late in the evening of February 20, 1980 Peggy Dean was senselessly murdered in the parking lot of a liquor store in Bakersfield, California.

Subsequently that night, Deputy Sheriff Lantz was dispatched to a nearby residence where he contacted a witness, Jerry Beheler. Beheler informed the deputy that he, the respondent, and another man named Daniel Chavez were present when Beheler's half-brother, Danny Wilbanks, shot Dean (RT 4-6, 10, 12, 14, 17.)

Lantz was instructed to transport Beheler to the sheriff's office. The deputy told Beheler that he was not under arrest (R.T. 7, 14-15).

At Lantz's request, Beheler directed him to respondent's and Chavez's residence. No one answered respondent's door, but Lantz did contact Chavez's father. The deputy told the senior Chavez that he wanted to speak to his son as soon as possible since he had information that the young Chavez was present at a shooting (RT 8-9, 15-17).

Later, during the early morning hours of February 21, Detective Del Ray taped an interview with Beheler in which Beheler told him that he, respondent, Chavez, and Wilbanks went to the liquor store to rob Dean of narcotics and that respondent provided a gun to Wilbanks for that purpose. After the shooting, respondent and Chavez fled home and Wilbanks left town (RT 31, 33-34).

During the interview, Beheler was neither arrested nor restrained. He was allowed to leave when the interview was over. Ray asked him to tell respondent and Chavez to contact the sheriff's department if possible. Ray considered respondent a "possible suspect." (RT 20, 32, 35, 37-38.)

At the same time, respondent and Chavez contacted Chavez's father. They had been hiding in respondent's home. The elder Chavez told them that the police said they were just "running scared" and that they just wanted to talk to them. (RT 54, 59, 69-71, 74.)

Later that day, Beheler called the two and advised them that he had told the police "everything." He encouraged them to call Ray because the police only wanted statements and were

after Wilbanks. Beheler counseled them not to worry about cooperating with the police, since he had been freed after his interview. He told them that he was out and they would be out too (RT 50-51, 65, 71-74).

After the telephone conversation, respondent and Chavez concluded that they would also be freed after they talked to the police. Chavez called Ray and told him that they had heard the police wanted to talk to them and were willing to come to the sheriff's department, but they had no transportation. Ray offered to provide transportation to the sheriff's department. Chavez did not expect to be put in jail and assumed that he and respondent would be transported home. (RT 21, 37, 47, 65-66, 68-69, 72-73, 85-87, 90-91.)

At 1:21 p.m. on February 21, Ray taped a twelve-minute interview with the respondent. The interview occurred in a "fairly small" interview room at the sheriff's office. Another deputy was also present. Respondent told the investigator that he had provided the gun with which Wilbanks had shot Dean. He was neither arrested nor restrained. No Miranda warnings were given. (RT 22, 32, 42).

During the interview, respondent also explained that he had decided to contact Ray because Beheler had told him to. (CT 30.)

Respondent was neither restrained nor arrested. He expressed no desire to end the interview or police contact. At the end, Ray advised him

that the district attorney would evaluate the tapes, and that he might be contacted later (RT 22-23, 42-43, 45).

After Chavez's interview, Ray requested them both to stay around town as witnesses. They were furnished transportation home. Other than Ray's request, no other measures were taken to ensure that respondent and Chavez would stay in the area (RT 24, 46-47,67, 88-89).

On February 26, respondent was arrested and taped again by Detective Ray (RT 25-27). During that interview the following exchanges occurred:

"Q. (Ray) ROSCOE, this is my, uh, or this will be my, my second interview with you.

"A. (Respondent) Right.

"Q. On 2-21-80, of this year, you voluntarily came to the Sheriff's Office and gave a statement regarding this offense. You were not in custody at that time and, uh, you were, uh, furnished transportation back to your residence after the interview was over, is that right?

"A. That's right.

"Q. OK, now for the second interview, things have, uh, have changed, at this time you are in custody.

"A. Um hmm. (CT 32.)

Respondent was then advised of his constitutional rights. He waived his rights, agreed to talk, and gave Ray essentially the same information he had before. The following exchange then occurred:

"Q. (Ray) OK, then it was the next day that, uh, you guys voluntarily came down to the office and gave your statements.

"A. (Respondent) Um hmm.

"Q. And like I said before, at that time you were not in custody.

"A. Um hmm.

Q. And you were returned to your homes and at that time I, before you left the office here I told you that these statements would be taken to the District Attorney's Office for their evaluation.

"A. Um hmm.

"Q. But their action I couldn't say at that time and during . . . during that first contact with you and, and this interview also, at

anytime did I make any threats or promises to you?

"A. No, no you did not.

"Q. And, now before I conclude this statement, do you have anything that you want to add?

"A. Umm, no, not as of this time, hmm um." (CT 38.)

The trial court granted the People's motion to admit the tape recording of respondent's February 21 interview (CT 85-92, RT 111).

REASONS FOR GRANTING WRIT

ARGUMENT

THE LOWER COURT'S REVERSAL OF RESPONDENT'S MURDER CONVICTION FOR MIRANDA ERROR, DESPITE ITS FINDING THAT NO "INDICIA OF ARREST" WERE PRESENT WHEN RESPONDENT CONFESSED, IS BASED ON AN UNWARRANTED INTERPRETATION OF MIRANDA V. ARIZONA

The California Fifth District Court of Appeal's reversal of respondent's convictions for murder and attempted robbery on the ground that he was not advised of his constitutional rights prior to confessing on February 21 is directly contrary to this Court's decision in Oregon v. Mathiason (1976) 429 U.S. 494 (per curiam). The appellate court's conclusion that respondent was "in custody" at the time he confessed and should have been advised of his rights pursuant to Miranda v. Arizona, supra, 384 U.S. 436

is yet another example of a lower court's reluctance to abide by this Court's scrupulous regard for the "explicitly stated rationale" of Miranda. (Beckwith v. United States (1976) 425 U.S. 341, 345; 2 W. Ringel, Searches, Seizures, Arrests, and Confessions (2d ed. 1980) § 27.2 at p. 27.3; Woodard, Custodial Interrogation after Oregon, Mathiason, 1978 Duke L. J. 1497, 1508-1509, 1519.)

In reaching its decision the lower court correctly noted that the mere fact that respondent's interview occurred at the police station did not justify requiring that he be advised of his Miranda rights. To make that determination, the court relied on another California case, People v. Herdan (1974) 42 Cal.App.3d 300, and

examined three additional factors: (1) whether or not investigation had focused on respondent; (2) whether objective "indicia of arrest" were present during the interview; and (3) the length and nature of the questioning. (Appendix "A" at pp. 14-25.)

The court then found, based on its "independent review" of the record, that the police had "focused" suspicion on the respondent and had probable cause to arrest him. It also concluded that the questioning of respondent was an interrogation. However, the court also held that "indicia of arrest" were not present during respondent's February 21 interview. Nevertheless, based on the presence of the other "factors," the court held that respondent was "in custody" at the time of his stationhouse

confession. (Appendix "A" at pp. 25-35.)

Petitioner submits that the appellate court's analysis and result is patently contrary to the United States Supreme Court's decision in Oregon v. Mathiason, supra. In that case, based on facts very similar to the facts in the instant case, the high court concluded that the defendant was not "in custody" and did not have to be advised of his Miranda rights.

In Mathiason, a burglary suspect responded to a request that he contact the police. He agreed to talk to an investigator at the police station. When the suspect arrived the investigator advised him he was not under arrest. They entered an office, closed the door, and sat down across a

desk from each other. The investigator explained that he believed the suspect was involved in a burglary and falsely stated that his fingerprints had been found at the scene. A few minutes went by and the suspect admitted taking the property. After being advised of his Miranda rights, the suspect gave a taped confession. Afterwards, the officer reiterated that the suspect was not under arrest and that he was released to work and be with his family. He also told the suspect that the district attorney would consider whether or not to file charges. (Oregon v. Mathiason, supra, 429 U.S. at 493-494.)

The Oregon Supreme Court reversed the defendant's conviction since he had been interrogated in a "coercive environment" without being

advised of his Miranda rights. (Id. at p. 494.)

This Court reversed the Oregon court. In its decision, this Court iterated that the warnings required by Miranda v. Arizona do not apply to every encounter between the police and a suspect. (Ibid.) Rather, the Miranda requirements are limited to interrogations occurring after a person has been taken into custody or otherwise deprived of freedom in a significant way. (Ibid.) In the absence of a "formal arrest or restraint of any movement," other factors such as the location of the questioning, the level of suspicion, and the nature of the questioning do not trigger Miranda warnings. (Id. at p. 495.) Thus, Miranda only applies to the "coercive environment" inherent in

the situation in which a suspect's freedom has been restricted to the point of being "in custody." (Ibid.)

Mathiason reflects this Court's punctilious regard for the precise dictates of Miranda v. Arizona, supra. The latter case carved out a special exception to the constitutional test of admissibility for confessions and admissions. (Miranda v. Arizona, supra, 384 U.S. at 457.) Prior to Miranda, the court examined the "totality of circumstances" surrounding a confession to determine if it was freely and voluntarily given without compulsion or inducement. (See, e.g., Haynes v. Washington (1963) 373 U.S. 503, 513-514.) In Miranda, the court held that a confession resulting from "custodial interrogation" would be

inadmissible unless the prosecution demonstrated the use of procedural safeguards effective to secure a suspect's privilege against self-incrimination. (Miranda v. Arizona, supra, at 444, 457, 478.)

The court defined a "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Miranda v. Arizona, supra, 384 U.S. at 444.) Essentially, this was a situation in which suspicion had focused on a person to the point that the authorities had chosen to restrain that person for further questioning. (Id. at p. 444, fn. 4.)

The court reasoned that no confession resulting from such questioning could truly be the product of free choice absent "adequate protective devices." (Id. at p. 458.) During such encounters, a suspect is involuntarily held, controlled, or confined and subjected to the anxieties of a persistent and prolonged pressure to confess in an intimidating "police-dominated atmosphere" that suggests the "invincibility of the forces of the law" and "the complete subjugation of the suspect to the will of the examiner." (Id. at pp. 446-457.) Confessions under such circumstances are inherently compelled absent evidence that the interrogators have taken "appropriate safeguards at the outset of the interrogation to insure that the statements were truly

the product of free choice." (Id. at p. 458.) The "core virtue" of the Miranda decision was its simplicity and precision in instructing the police and courts on the conduct of "custodial interrogations." (Fare v. Michael C. (1978) 442 U.S. 707, 718; Fare v. Michael C. 439 U.S. 1310, 1314 (Rehnquist, J., in chambers; Miranda v. Arizona, supra, at 468.)

Mathiason meticulously preserves and confines Miranda's application to only the most intense of encounters between investigators and an accused -- the interrogation of a suspect who has been involuntarily held, controlled, or confined by the authorities and whose freedom to depart is restricted in a significant way. Miranda was not meant to exclude admissions and confessions

made by a suspect, such as respondent in this case, who voluntarily appears at the police station and willingly answers police questions without being placed in custody. The police do not have to stop a person who wishes to confess to a crime. (Miranda v. Arizona, supra, 384 U.S. at 478.) Such encounters are of a lesser scale and do not inherently nullify a person's will to resist or freedom of choice.

Yet, despite the similarities between Mathison and the instant case, the lower court came to the opposite conclusion. Its analysis requires police officers to consider immaterial factors rather than simply relying on whether or not a suspect was actually in custody. The result is the exclusion of evidence voluntarily provided by the

respondent without being subjected to the "inherent coercion" or "overwhelming compulsion" of a Miranda-type custodial interrogation.

In assessing whether respondent was in custody on February 21, the appeals court found it significant that he was subjected to an "interrogation" as that term is defined in Rhode Island v. Innis (1979) 446 U.S. 291, 301. However, Mathiason clearly rejects such an analysis. The fact that the investigator in Mathiason told the defendant that he suspected his guilt and then, falsely, told him that his fingerprints had been found at the scene had "nothing to do" with custody. (Oregon v. Mathiason, supra, 429 U.S. at 495-496.) Any interview with an officer who suspects the interviewee's guilt will

have its "coercive aspects," but that does not trigger the Miranda requirements. (Id. at 495; People v. P. (N.Y. App. 1967) 286 N.Y.S.2d 225, 230.) An "interrogation" cannot "bootstrap" the status of a suspect to that of "custody."[1/]

The lower court also gave "great weight" to the fact that the "focus" of investigation had fallen on respondent and that there was "probable cause" to arrest him at the time of the interview on February 21. However, the Miranda requirements are not to be imposed simply because "the questioned

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1. Rhode Island v. Innis, supra itself states that "custody" and "interrogation" are separate concepts. Where custody is conceded, the court must determine independently whether the suspect was interrogated. (Id. at p. 300.)

person is one whom the police suspect." (Oregon v. Mathiason, supra, 429 U. S. at 495.) Indeed, this Court in Beckwith v. United States, supra, 425 U.S. at 346 cited with approval the following language from United States v. Caiello (2nd Cir. 1969) 420 F.2d 471, 473:

> "'It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the Miranda requirements with regard to custodial questioning.'"

(See also United States v. Jimenez (7th Cir. 1979) 602 F.2d 139, 145 & fn. 7 and cases cited therein.)

Indeed, to rely merely on "probable cause to arrest" in determining "custody" is contrary to the express language of the Miranda decision.[2/] In its opinion, this Court explicitly stated that by "focus of suspicion" it meant that a person had been interrogated after being "taken into custody or otherwise deprived of his freedom of action in any significant way." (Miranda v. Arizona, supra, 384 U.S. at 444, fn. 4.) (Emphasis added.) The use of the word "significant" is not mere surplusage. (See People v. P.,

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2. Rhode Island v. Innis, supra, 446 U.S. at 301 emphasizes that the Miranda safeguards were "designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." (Emphasis added.)

supra, 286 N.Y.S.2d at 234.) To require that the Miranda warnings be given whenever an officer has probable cause to arrest, is to render the "deprivation of freedom" language meaningless. Just because an investigator has probable cause to arrest does not mean that a suspect is automatically being subjected to the anxieties and inherent coercion of being involuntarily held by the police. Surely, the respondent in this case, who was not restrained and never lead to believe that his freedom of depart was restricted in any way, was not under such compulsion.

In short, Mathiason holds that neither "focus of suspicion" nor the nature of the questioning alone or in combination are sufficient to render a suspect "in custody", absent other

evidence of "significant" restraint. As the appeals court opinion itself concedes, such other restraint was absent in this case.

The court in this case specifically found that no "objective indicia of arrest" were present at the time of respondent's interview. In making its finding, the court considered factors similar to those considered by the Supreme Court in Mathiason in determining whether or not the defendant in that case was "in custody."

The respondent voluntarily contacted the police and went to the station house at the request of the investigator. He believed that he would not be held in custody due to the experience of his accomplice, Beheler. He was interviewed for only twelve

minutes and did in fact leave the station without hindrance. When he was interviewed after his arrest a few days later, he agreed that he had voluntarily consented to his interview on February 21 and was not in custody during that interview. His experience did not approach the level of inherent coercion evident in a true "custodial investigation."

One obvious difference in the facts between Mathiason and the instant case is that the respondent was never told explicitly that he was not under arrest. However, the record shows that the respondent contacted the investigator because he believed he would not be held in custody. In any event, it is not required that an officer inform suspects whether or not they are under

arrest. (See, e.g., Barfield v. Alabama (5th Cir. 1977) 552 F.2d 1114, 1118.)

Under these circumstances, the facts in the instant case are even more compelling than the facts in Mathiason that "there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way." (Oregon v. Mathiason, supra, 429 U.S. at 495.)

The flaw in the appellate court's decision in the instant case stems from its reliance on another California appellate decision in People v. Herdan, supra, 42 Cal.App.3d at 307, a decision which obviously predates the United States Supreme Court's decision in Oregon v. Mathiason, supra. Herdan set forth a "four-factor" analysis to determine whether or not custody has

attached in situations in which an arrest has not yet taken place. These factors are:

> "(1) the site of the interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning." [Fns. omitted.]

The Herdan analysis does not conform to the dictates of Miranda v. Arizona, supra. (Oregon v. Mathiason, supra, 429 U.S. at 495.) In fact, it is remininscent of the "coercive environment" analysis rejected in Mathiason. Therefore, opinions such as the one in the instant case needlessly hamper law enforcement by perpetuating an erroneous approach in

determining the point of time at which Miranda warnings are required.

Furthermore, the "core virtue" of Miranda -- its establishment of clear, precise, and specific guidelines is eviscerated by requiring investigating officers to assess and weigh a variety of immaterial factors. Miranda's promise that its requirements would not "constitute an undue interference with a proper system of law enforcement" (384 U.S. at 481) is broken. The prosecution is deprived of relevant, valuable, and constitutionally admissible evidence.

The reversal of respondent's conviction in the instant case loosens Miranda from its "doctrinal moorings." (Fare v. Michael C., supra, 439 U.S. 1310, 13114 (Rehnquist, J., Circuit

Justice.) Respondent voluntarily came to the police station and left after a twelve-minute interview. He never believed he was in custody and nothing about the interview indicated that his freedom to depart was limited in any significant way. The reviewing court concluded that no indicia of arrest were present. Yet, the Fifth District Court of Appeals has imposed a Miranda requirement based on other factors which have nothing to do with whether or not the respondent was subjected to the persistent pressure of an actual "custodial interrogation." The court's decision results in the potential release of a professed murderer. It contributes nothing toward protection of the rights of the accused since it requires

Miranda admonitions in noncustodial, non-coercive contexts that do not suggest the "invincibility of the forces of the law" nor "the complete subjugation of the individual to the will of his examiner." (Miranda v. Arizona, supra, 384 U.S. at 450, 457.)

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Petitioner respectfully submits that a writ of certiorari should issue to review the decision of the Fifth District Court of Appeal in the State of California.

Respectfully submitted,

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APPENDIX A

Copy of Opinion Issued by Fifth District Court of Appeal of the State of California in People v. Howard, 5 Crim. 5181

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,	) 5 Crim. No. 5181
Plaintiff and Respondent,	)
v.	) (Super.Ct.No. 20967)
ROSCOE HOWARD, JR.,	) O P I N I O N
Defendant and Appellant.	)

APPEAL from a judgment of the Superior Court of Kern County. Walter Osborn, Jr., Judge. Reversed.

Chain, Younger, Jameson, Lemucchi, Busacca & Noriega, James E. Noriega, and Eugene R. Lorenz, for Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Roger E. Venturi and Ward A. Campbell, Deputy

Attorneys General, for Plaintiff and Respondent.

--ooOoo--

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664/211 and 187).

Appellant, Roscoe Howard, Jr., and codefendants were charged with violations of Penal Code sections 664/211 (attempted robbery) and 187 (murder). As a special circumstance it was alleged that appellant was either engaged in, or was an accomplice to, an attempted robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(i). It was also alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a).

The court granted separate trials for appellant's codefendants.

The jury found appellant guilty on both counts and found the alleged special circumstance and enhancement to be true.

These are the facts:

Daniel Chavez, one of the original codefendants in appellant's case, was granted immunity and testified against appellant.

On February 20, 1980, appellant, Daniel Chavez, and Jerry Beheler drove to Beheler's Bakersfield home. Appellant had in his possession his father's 357 magnum and he agreed with the others that it would be possible to "take" some hashish from a woman at the Palms Liquor Store.

At Beheler's house, Danny Wilbanks joined the three in planning the robbery. Wilbanks began to handle appellant's gun, which had been lying on the table. He

removed the bullets from the gun, and said he only needed one bullet, and then reloaded the gun. Appellant retrieved the gun, replaced it on the table, and warned Wilbanks not to play with it. Chavez and appellant wanted to use the gun to bluff the robbery victim only. However, they concurred that the gun might be necessary as protection against a friend of the woman's who had a knife.

Using Beheler's car, Wilbanks drove the other three to the liquor store. Appellant's gun rested on his lap. Appellant cautioned Wilbanks that the gun did not have a safety and that no one was to be killed. The plan was to leave if the woman did not give them the hashish.

After the three entered the store's parking lot, a woman, Peggy Dean, approached them. She stated that she had not expected them and then handed Wilbanks

a tinfoil package. She saw the gun and inquired as to its purpose. Chavez said it was for protection. She indicated she had 12 more "grams." Other foil packages were visible in her hands. Wilbanks pointed the gun at her and demanded the rest of the hashish. She said she did not think he would fire the gun. However, despite appellant and Chavez' protests, Wilbanks shot her once. The four men then drove away.

Appellant gave Wilbanks instructions on how to return to Beheler's house. Appellant also regained possession of the gun at this time. Upon their arrival at Beheler's house, appellant hid the gun in the back yard and left with Chavez through a back gate. Appellant threw the gun's remaining bullets away.

At trial Kern County Deputy Sheriff Lantz testified that he interviewed Jerry

Beheler. Beheler identified Wilbanks as the shooting perpetrator and also told the deputy he thought the gun was in his back yard. Additionally, he indicated that two other people were also present during the incident, naming appellant and Chavez.

Lantz was directed to transport Beheler to the sheriff's department. On their way, Lantz asked Beheler to point out the homes of the other two "witnesses" and Beheler complied by showing him appellant's and Chavez' homes. Lantz knocked on appellant's door, but neither appellant nor Chavez answered. Lantz then contacted Chavez' father next door and left word that the police wanted to talk to his son.

After finding the gun hidden in Beheler's back yard, sheriff's investigator Ray interviewed Beheler.

admitted he had gone to the scene of the crime in order to rob the decedent. He also stated appellant went along "for the ride" and had nothing to do with the robbery.

The next morning, at the urging of Chavez' father and Beheler, appellant and Chavez called the sheriff's department. They were transported to the sheriff's department for interviews. In this interview, appellant admitted the gun was his father's, but initially stated that he had loaned it to either Wilbanks or Beheler for target practice only. He denied any intent to rob the victim, but admitted knowing that Wilbanks planned to rob her. However, he then admitted that Beheler had wanted the gun for use in the robbery and that he (appellant) knew that. He also denied

knowing the gun's whereabouts. He further denied any knowledge of Wilbanks' apparent design to shoot the victim and maintained that he planned to contact the police despite being scared. Upon completion of the interviews, appellant and Chavez were transported back to their homes by the sheriff's department.

Appellant was arrested several days later. At this time he was given his Miranda rights and was re-interviewed. He told Detective Ray that he and Beheler had procured the gun from appellant's house to rob the victim. Appellant and Chavez agreed only to use the gun as a bluff. He admitted that he and Chavez had hidden the gun.

An autopsy revealed that Peggy Dean died of a gunshot wound to the head.

Appellant testified in his own behalf.

He claimed he was just going along for the ride the night Danny Wilbanks shot Peggy Dean. He denied any complicity in her murder and any knowledge of Wilbanks's actual intent to rob her, but admitted his participation in discussion of a plan to rob her by bluffing with his father's gun. He admitted assisting in hiding the gun and bullets.

At trial, the People moved for admission of appellant's statements made to a sheriff's investigator on February 21 and 26, 1980. A hearing on this motion was held and the court granted the motion to admit appellant's statements. The facts developed at this hearing are as follows:

On February 20, 1980, Kern County Deputy Sheriff Lantz responded to a call at Palms Liquor Store in Bakersfield. Upon his arrival he found the body of the decedent, Peggy Dean. Lantz was directed

by the desk officer to a home about a block and a half away from the liquor store. Lantz talked to Jerry Beheler.

Beheler told Lantz that his half-brother, Danny Wilbanks, shot Dean. He knew where the gun was, but did not explain how Wilbanks got it. Beheler further told the officer that appellant and Chavez were also present.

Lantz was instructed to transport Beheler to the sheriff's department. He was told that he was not under arrest.

At Lantz' request, Beheler showed Lantz appellant's and Daniel Chavez' residences. No one answered the door at appellant's house, but Lantz talked to Angelo Chavez, Daniel's father, at the Chavez home. Lantz told Mr. Chavez that if he should be contacted by his son, he should tell his son to contact the sheriff's office as soon as possible as

they were interested in asking him questions because they had information his son had been present at a shooting.

Before Beheler was interviewed at the sheriff's office, sheriff's investigator Ray found a handgun hidden in Beheler's back yard.

Ray taped an interview with Beheler in which Beheler told him that he and three others, including appellant, had gone to the liquor store to rob Dean of hashish and that appellant had provided a gun to Wilbanks for that purpose. He also told Detective Ray that Chavez and appellant had left his house on foot and they seemed worried and scared.

By the end of the interview, Ray considered appellant and Beheler as possible murder suspects. Beheler was allowed to leave. He had been neither arrested nor restrained. As Beheler

left, Ray asked him to tell appellant and Chavez to contact the sheriff's department if possible.

The following day Chavez called Detective Ray and indicated that he and appellant would talk to the police. Chavez' father had urged them to call the police. Beheler also contacted them and advised them to call the police because he felt the police only wanted statements and were after Wilbanks.

Detective Ray sent a deputy to pick up appellant and Chavez at their respective residences. Ray conducted a 12-minute interview with appellant. Appellant told Ray that Beheler had gotten the gun from him to rob Peggy Dean. At that point, Ray testified that he considered appellant a suspect. This interview was taped. At no time during this interview did Detective Ray advise appellant of his Miranda

Miranda rights. After interviewing appellant and Chavez, Detective Ray released them and provided them transportation home. No arrests were made at that time. After the interview, Detective Ray told each of the individuals they should stay around town. Detective Ray indicated he wanted members of the district attorney's office to read the transcribed statements and make a decision as to whether an arrest would be made. He admitted this was not normal procedure in homicide cases.

An all-points bulletin was broadcast for the arrest of Daniel Wilbanks on February 21, 1980. Appellant, Beheler and Chavez remained at large after they had each given their taped interviews to the detectives. Later in the evening on February 21, 1980, Daniel Wilbanks turned himself in at the sheriff's office

in Lancaster. On February 25, 1980, a warrant for the arrest of the other three participants, including appellant, was issued and they were arrested on February 26, 1980. After their arrest each gave a second taped statement to the detectives. At this time each was advised of his constitutional rights. They each waived them and gave full statements concerning the instant case.

I

Appellant's primary contention on appeal is that the court erred when it admitted the statements of appellant because appellant had not been advised of his Miranda rights during the February 21st interview. Appellant contends that pursuant to Miranda v. Arizona (1966) 384 U.S. 436, appellant was in custody during the February 21st interview and thus entitled to have the Miranda admonitions. Furthermore, appellant contends

that custody arises, at the "latest," at the point when the investigating officer has probable cause to believe that the person being questioned has committed an offense. Appellant apparently contends that the police had probable cause to arrest appellant prior to the time of the February 21st interview and that consequently it was necessary that appellant be given his Miranda rights before any interrogation.

Respondent's primary argument is that appellant was not entitled to Miranda admonitions during the February 21st interview because he was not in custody.

In Miranda v. Arizona, supra, 384 U.S. 436, 467-473, the United States Supreme Court held that to insure that any statement a suspect makes in a custodial interrogation setting is a product of his free will, the interrogation

must be surrounded by certain essential procedural safeguards:

> "[B]efore any questioning begins the police must give the suspect the now-familiar 'Miranda warnings,' advising him primarily of his right to remain silent and to have the assistance of counsel . . .; to be valid, any waiver thereof must be both knowing and intelligent; and the questioning must terminate if the suspect directly or indirectly invokes any of these rights." (People v. Pettingill (1978) 21 Cal.3d 231, 237.)

The reason for Miranda's requirement of express advisement of rights is to dispel the coercion inherent in an environment of incommunicado-police-dominated interrogation. (Miranda, supra, at pp. 457-458.) The prosecution has the burden of establishing the voluntariness of a defendant's statement beyond a reasonable doubt. (People v. Jimenez (1978) 21 Cal.3d 595.) Absent proof beyond a reasonable doubt of proper advisement and valid waiver of

rights, any admission or confession obtained is deemed coerced. (People v. Murtishaw (1981) 29 Cal.3d 733, 753, mod. 29 Cal.3d 836a.) The trial court's ruling on a Miranda issue may not be set aside by an appellate court unless it is "palpably erroneous." (In re Eric J. (1979) 25 Cal.3d 522, 527.) Also, as to conflicting testimony, the appellate courts must accept the version of events most favorable to the People to the extent that it is supported by the record. (People v. Jackson (1980) 28 Cal.3d 264, 300; People v. Jimenez, supra, 21 Cal.3d 595, 609.) However, where the facts are uncontradicted, the reviewing court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753;

People v. Jimenez, supra, 21 Cal.3d at p. 609.)

A succinct summary of when the procedural safeguards as set out in Miranda come into play is found in People v. Murphy (1982) 127 Cal.App.3d 743, 747-748:

> "The procedural safeguards set out in Miranda protecting the Fifth Amendment right against self-incrimination come into play only when 'custodial interrogation is involved. (384 U.S. at p. 444 [16 L.Ed.2d at pp. 706-707]; People v. Farris (1981) 120 Cal.App.3d 51 [174 Cal.Rptr. 424]; People v. Blouin (1978) 80 Cal.App.3d 269, 283 [145 Cal.Rptr. 701].) 'Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."' (Oregon v. Mathiason (1977) 429 U.S. 492, 495 [50 L. Ed. 2d 714, 719, 97 S.Ct. 711].) 'While arrest is not a condition precedent to the right to Miranda and Dorado [People v. Dorado (1965) 62 Cal.2d 338, 358-364 (42 Cal. Rptr. 169, 398 P.2d 361)] warnings, custody is: the vice requiring the prophylaxis of the notice of rights is the inherently coercive atmosphere pervading custodial interrogation. [Citation.]' (People v. Leach (1975 15 Cal.3d 419, 443

[124 Cal.Rptr. 752, 54 P.2d 296].)

"Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Miranda v. Arizona, supra, 384 U.S. at p. 444 [16 L.Ed.2d at p. 706].) In California, it is well settled that custodial interrogation can occur without a formal arrest. It exists where the defendant is either 'physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.' (People v. Arnold (1967) 66 Cal.2d 438, 448 [58 Cal. Rptr. 115, 426 P.2d 515]; People v. Farris, supra, 120 Cal.App.3d at p. 56.) It has been said: 'When an arrest has not yet taken place, the factors considered in deciding whether custody has attached are many. Among the most important are: (1) the site of the interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.' (People v. Herdan (1974) 42 Cal. Cal.App.3d 300, 306-307 [116 Cal. Reptr. 641], fns. omitted; see also People v. Blouin, supra, 80 Cal.App.3d at p. 283; People v. Arnold, supra, 66 Cal.2d at p.

at p. 449.)" 1/

Whether appellant was in custody during the initial questioning is the central issue in this case. The test of custody is not dependent upon the subjective intent of the interrogator. As noted above, the question is "whether the suspect was actually deprived of his

1/ Prior to Miranda, courts focused on the factor of whether the investigation had begun to focus on a particular suspect. (Escobedo v. Illinois (1964) 378 U.S. 478; People v. Durado (1965) 62 Cal.2d 338.) Since Miranda, however, the test simply is whether the suspect is in custody. Focus on the suspect, however, remains an element in deciding whether custody has taken place. (See People v. Murphy, supra, 127 Cal.App. 3d 743, 747-748, and cases cited therein.)

Also, it should be noted that although persons temporarily detained for investigation of crimes are actually deprived of their freedom of movement for the period of the detention, an investigatory on-the-scene detention does not constitute "custody" for the purposes of Miranda. (Miranda v. Arizona, supra, at pp. 477-478; People v. Patterson (1979) 88 Cal. App.3d 742, 747.)

freedom in any significant way or, as a reasonable person, was led to believe his freedom of movement was restricted by the pressures of official authority." (People v. Blouin (1978) 80 Cal.App.3d 269, 283.)

We must then consider the facts of the instant case in light of the suggested "four factor" test of People v. Herdan (1974) 42 Cal.App.3d 300, 306-307, to determine whether appellant was "in custody" when he made his statement to sheriff's officers on February 21, 1980.

(1) The Site of the Interrogation.

In People v. Herdan, supra, page 307, footnote 9, the court noted that "Usually, interrogation at a police station is deemed inherently coercive, although this is not the case if the suspect comes to the police station on his own initiative or voluntarily. (See People v. Hill (1969) 70 Cal.2d 678, 693-694 . . . .)"

The California Supreme Court has held a defendant's confession inadmissible where the defendant had voluntarily gone to the police station to give a statement and was not Mirandized in two significant cases. (People v. Arnold (1967) 66 Cal.2d 438; People v. White (1968) 69 Cal.2d 751.)

In People v. Arnold, supra, the court recognized that custody constitutes an essential element of the accusatory stage. In Arnold, the defendant was requested by the district attorney to come in for questioning. The district attorney was investigating the death of the defendant's child. The investigation strongly suggested that defendant was responsible for the death of her child. The district attorney did not advise the defendant of her constitutional rights and he contrived a leading question to extract highly incriminating admissions.

The court held in Arnold that the confession was inadmissible. (Id., at p. 450.) The determinative factor in Arnold was not that the defendant was being interrogated at the police station, but rather, that "The deputy district attorney had undertaken a process of interrogation that lent itself to eliciting incriminating statements." (Id., at p. 449.)

In People v. White, supra, the defendant voluntarily accompanied officers to the police station to make a statement about a murder. While he was there, information was obtained which focused suspicion on him. The officer confronted the defendant with the evidence and elicited a confession. The California Supreme Court held that the record showed custodial interrogation, noting that the investigation had focused on the defendant, the officer did not intend

to permit defendant to leave without explaining the evidence, and the officer's remarks were accusatory in tone. (People v. White, supra, 69 Cal.2d 751, 760-761.)

The California Supreme Court has also found a defendant's statements admissible where he had voluntarily gone to the police station to give statements and was not Mirandized. (People v. Hill, supra, 70 Cal.2d 678, 693-694; see also People v. Sam (1969) 71 Cal.2d 194, 201-202.) The United States Supreme Court has also addressed the issue of when a suspect is entitled to Miranda warnings when he voluntarily comes to the police station for questioning. (Oregon v. Mathiason (1977) 429 U.S. 492.)

Appellant in the instant case was interrogated in a small room at a police station. Two other officers were present. As stated above, usually an interrogation

at a police station is deemed inherently coercive. However, this is not always the case, especially if the suspect comes to the police station on his own initiative or voluntarily. Consequently, the issue of whether appellant in the instant case was in custody during the February 21st interview will hinge on the other three factors discussed in People v. Herdan, supra, 42 Cal.App.3d 300.

(2) Whether The Investigation Had Focused On The Suspect

Appellant relies heavily on this factor. As was discussed, supra, the fact that the police investigations had focused on the defendants in People v. White and People v. Arnold, supra, was significant in the court's determination that the defendants in those cases were in custody. Although no longer the sole determinative factor, whether an investigation has

focused on the suspect, is still a significant factor in determining when a suspect is "in custody" for the purpose of Miranda. (People v. Murphy, supra, 127 Cal.App.3d 743, 747-748.)

Not only does appellant contend that he was entitled to Miranda admonitions because the investigation had focused on him prior to the February 21st interview, but he "apparently" contends that he was entitled to have Miranda warnings because there was probable cause to arrest him at the time of his interview. However, the real focus in a Miranda case is not when probable cause to arrest occurs. Probable cause involves both an objective and a subjective standard. The test of custody is not dependent upon the subjective intent of the interrogator. Rather, the fact of probable cause is merely one aspect to consider in determining whether a defendant's

Miranda rights have attached.

> "True, probable cause to arrest, like arrest itself, may play a significant role in the application of the rule but, unlike the case of actual arrest, probable cause to arrest is not in all cases, synonymous with the restraint contemplated by the Miranda doctrine." (People v. Blouin, supra, 80 Cal.App.3d 269, 283.)

The "police" had a substantial amount of information implicating appellant in the attempted robbery-homicide before they interviewed him on February 21st. They knew from Beheler appellant and the two others had discussed robbing the victim at Beheler's home, that appellant had furnished Wilbanks the loaded gun for that purpose, that they then drove to the liquor store to rob the victim of her hashish, and that appellant and Chevez had left after the shooting, "scared." The police had found the gun hidden in Beheler's back yard. They further admitted appellant was a "possible suspect" by

them and had appellant not gone to the sheriff's office voluntarily, a warrant would have been issued for his arrest.

It is clear from the record that the investigation had focused on appellant, among others, before the February 21st interview, and further, the police had sufficient information to constitute probable cause to arrest appellant. In fact, an "all-points" bulletin had already been put out for Wilbanks.

At the interview appellant told the police that they, the four suspects, intended to rob the victim of her hashish, and this was why he obtained his father's gun and gave it to Wilbanks. And yet, even at this point during the interview, the police did not Mirandize appellant.

As discussed above, the "focus or probable cause" factor is no longer dispositive, by itself, of the "in-custody"

issue. However, upon the above facts, it is significant and entitled to great weight.

(3) Whether The Indicia Of Arrest Were Present.

Appellant and Chavez were interviewed in a small interroation room at the police station. Two police officers were present. Appellant was not told he was not in custody or that he was free to leave when he wanted. However, when he gave the second statement after he was arrested and Mirandized, he was asked if he agreed with the statement "You were not in custody at that time." Appellant replied, "That's right." Appellant and Chevez were not arrested at the end of their interview. In fact, the officers furnished them transportation home. However, Chavez and appellant were specifically told not to leave town. In People v. White, supra, 69 Cal.2d 751, the police officer admitted that he did not intend to permit the

defendant to leave the police station without explaining the evidence. On the other hand, in the instant case, Chavez and appellant were permitted to leave the police station following the first interview. Their friend, Beheler, had also given a statement to the police and was permitted to leave. In addition, there was testimony that Chavez and appellant felt they would be able to leave after their interview as well. On balance, and giving substantial weight to appellant's belief at the time that he was not in custody and the fact that he was not arrested at the end of the first interview, we conclude that the indicia of arrest were not present on February 21st.

(4) The Length and Form of Questioning.

Obviously, the longer the interview and the more accusatory in tone the interview is, the more likely a suspect will be

deemed to be in custody pursuant to Miranda. Generally, interrogation pursuant to Miranda refers to questioning or conduct designed or likely to produce incriminating responses. (Rhode Island v. Innis (1980) 446 U.S. 291.)

In the instant case the interrogation of appellant on February 21, 1980, was designed to produce incriminating responses. Before the officers interrogated appellant they knew he was involved in the attempted robbery and/or homicide of the victim. At the beginning of the interview the police immediately began to ask appellant questions regarding the incident. It is apparent from a reading of the transcript that the questions were designed to elicit incriminating responses. For example, at one point during the interview appellant told the officers that he loaned his gun to Danny Wilbanks because he wanted to do some "target practice."

The police officers immediately seized on this and asked appellant, "Well, Jerry Beheler told us that, that the intention of him going over there was to rob her." Appellant's response was, Yeah, yeah, yeah." The officers asked, "That's why he got the gun from you?" Appellant replied, "Yeah, yeah." Continuing, the officers asked, "So he got the gun from you and then you guys all got in the car, went down to the liquor store . . ." Appellant responded, "Yeah." "And Danny's intent was to rob her of her hash?" Appellant responded, "Yeah, just, just, yeah, just to get her hash and that's it."

We conclude that when the police confronted appellant with the evidence they had received from Jerry Beheler this was designed to elicit an incriminating response pursuant to Rhode Island v. Innis, supra. (See People v. White, supra,

69 Cal.2d 751, 760-761.)

As previously stated, the prosecution has the burden of establishing a voluntariness of the defendant's statement beyond a reasonable doubt. (People v. Jimenez, supra, 21 Cal.3d 595. In the instant case there appears to be no conflicting testimony. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753.)

We conclude, from our independent review of the record, that the respondent has not met its burden of establishing the voluntariness of appellant's statement beyond a reasonable doubt. Further, we conclude the incriminating statements from the February 21st interview should have been suppressed by the trial court.

Almost immediately after the shooting here, the police identified the four suspects and interviewed Beheler. He named all the other coparticipants. Based on Beheler's statement, an "all-points" bulletin was immediately put out on Wilbanks and the police immediately went in search of appellant to question him. At the time of the February 21st interview, they had "focused" upon appellant and the others and had probable cause to arrest them. Yet, appellant was not then Mirandized. In the course of the interrogation, by artful questioning and confrontation with Wilbank's statements, appellant confessed to felony murder. A confession has been defined as "amounting to a declaration of defendant's intentional participation in a criminal act." (People v. McClary (1977) 20 Cal.3d 218, 230.) The improper introduction of a confession

is reversible error per se. (People v. Randall (1970) 1 Cal.3d 948, 958.)

In sum, we hold that appellant was in custody during his February 21st interrogation. His statements at this interrogation were wrongfully admitted because he was not advised of his Miranda rights prior to the interview and, as stated above, the wrongful introduction of a confession is reversible error, per se.

II.

Appellant's last contention on appeal is that the trial court erred in failing to instruct the jury in the law of conspiracy. In the instant case it was the prosecution's theory that appellant was an aider and abetter during the attempted commission of the robbery and therefore was liable for the victim's murder on a felony murder theory. It was appellant's theory that the victim's death resulted

from the independent act of a coconspirator.

There is no merit to this argument.

After argument by both sides, the court ruled that it would not give conspiracy instructions. The court apparently felt that since there was no evidence whatsoever that appellant withdrew or abandoned his intent to rob, conspiracy instructions were not mandated.

The court gave CALJIC No. 8127--first degree felony murder--aider and abetter, to the jury. This instruction reads as follows:

> "If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of [robbery], all persons who either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."

In addition, the court gave a special instruction submitted by appellant. This instruction was very similar to CALJIC No. 8.26--first degree felony murder in pursuance of a conspiracy. This special instruction read as follows:

> "If a human being is killed by anyone of several persons engaged in the perpetration of, or attempt to perpetrate the crime of robbery and if the killing is done in furtherance of a common design to commit such crime or if the killing is a natural and reasonable or probable consequence of any act knowingly aided or encouraged by the defendant, then all such persons so jointly engaged are guilty of murder of the first degree whether the killing is intentional, unintentional, or accidental."

The court also gave a special instruction offered by the People. This special instruction read as follows:

> "'A killing' 'in the perpetration of' a robbery attempt need not have been committed for the purpose of perpetrating the robbery; it is sufficient that the two acts, that is, the robbery attempt and the

killing, be part of one continuous transaction. If such is the case, then the killing so committed constitutes a murder in the first degree."

This language comes from People v. Johnson (1972) 28 Cal.App.3d 653, 658. The court also gave CALJIC No. 8.21, first degree felony murder. This instruction reads as follows:

"The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there is in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.

"The specific intent to commit robbery in the commission or attempt to commit such crime must be proved beyond a reasonable doubt."

Appellant contends that his special instruction which contained some of the concepts contained in the conspiracy instructions was negated by the fact that the court also gave CALJIC No. 8.21 and CALJIC No. 8.27, supra. Appellant contends

that "It would seem that with the giving of these conflicting instructions the jurors would be thoroughly confused as to the state of the law."

Appellant seeks to rely on the testimony that he repeatedly said he did not want Danny Wilbanks to use the gun on the victim of the robbery, to absolve his responsibility in the death of the victim. However, there was uncontradicted testimony appellant participated in the planning of the robbery, supplied the lethal weapon to his coparticipant, accompanied his coparticipants to the scene of the crime, and further aided and abetted the crime by assisting in the escape and the disposal of the gun and bullets. While there is evidence appellant did not want Danny Wilbanks to fire the gun, there was no testimony whatsoever appellant ever intended to withdraw from the

underlying crime of robbery. Thus, appellant's contention cannot stand. In addition, appellant's argument that he was precluded from arguing withdrawal is negated by the fact that the court in the instant case gave CALJIC No. 3.02--termination of liability for aiders and abetters. This instruction reads as follows:

> "One who has aided and abetted the commission of a crime, with knowledge of the unlawful purpose of the perpetrator of a crime, may end his responsibility for the crime by notifying the other party or parties of whom he has knowledge of his intention to withdraw from the commission of the crime and by doing everything in his power to prevent its commission."

Thus, appellant's argument fails and the trial court was entirely correct in refusing to instruct the jury on the law of conspiracy.

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- - -

For the reasons previously stated, the judgment is reversed and remanded for new trial.

MARTIN
J.*

WE CONCUR:

ZENOVICH
Acting P.J.

HANSON (P.D.)
J.

*Assigned by the Chairperson of the Judicial Council.

APPENDIX B

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

THE PEOPLE, ... Plaintiff and Respondent,	5 Crim. No. 5181
vs.	(Super. Ct. No. 20967)
ROSCOE HOWARD, JR., ... Defendant and Appellant.	

BY THE COURT

The Petition for Rehearing filed herein by Respondent is denied.

Dated AUG - 5 1982 .....

I CONCUR:

ZENOVICH Acting P.J.

HANSON (P.D.) J.

APPENDIX C

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

.....5th.....District Division....,....Crim. No. 5181.....

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

PEOPLE

v.

ROSCOE HOWARD, JR.

Respondent's petition for hearing DENIED.

BIRD
Chief Justice

Supreme Court filed Sep 29 1982

I, LAURENCE P. GILL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court as shown by the records of my office.

Witness my hand and the seal of the Court this

_____day of OCT 7 1982 A.D. 19___ Clerk

By J. ROSSI
Deputy Clerk

APPENDIX D

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

82 OCT 4 A10:37

ENTERED 186

ROSCOE HOWARD, JR.,

Defendant and Appellant.

5 Crim. No. 5181
Superior Court No. 20967

REMITTITUR

APPEAL from the judgment of the Superior Court of Kern County. WALTER OSBORN, JR., Judgment: September 22, 1980.

I, KEVIN A. SWANSON, Clerk of the Court of Appeal of the State of California, for the Fifth Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on July 16, 1982, and that this

opinion or decision has now become final.

WITNESS my hand and the seal of the
Court affixed at my office this
1st day of October, 1982.

KEVIN A. SWANSON, Clerk

By

Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

THE PEOPLE,	) 5 Crim.
	) No. 5181
Plaintiff and Respondent,	)
	) (Super. Ct.
v.	) No. 20967)
	)
ROSCOE HOWARD, JR.,	) O P I N I O N
	)
Defendant and Appellant.	)
	)

APPEAL from a judgment of the Superior Court of Kern County, Walter Osborn, Jr., Judge. Reversed.

Chain, Younger, Jameson, Lemucchi, Busacca & Noriega, James E. Noriega, and Eugene R. Lorenz, for Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Roger E. Venturi and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

--ooOoo--

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664/211 and 187).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF KERN

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, vs. ROSCOE HOWARD, JR., Defendant and Appellant.	5 Crim. No. 5181 No. 20967 82 OCT p2:04 NOTICE OF FILING

TO: OFFICE OF THE ATTORNEY GENERAL
555 Capitol Mall, Suite 350
Sacramento, CA 95814

DISTRICT ATTORNEY
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Attorney at Law
1227 California Avenue
Bakersfield, CA 93304

NOTICE OF APPEAL ABANDONMENT OF APPEAL

ORDER OF DISTRICT COURT OF APPEAL

X REMITTITUR ON APPEAL ENTERED 187
(see attached)

was filed in this office on the 4th day of October, 1982

DATED: October 5, 1982

GALE S. ENSTAD
County Clerk and ex Officio Clerk
of the Superior Court

By ....., Deputy
C. S. Ring

DECLARATION OF MAILING

On the date stated below, I mailed (by first-class mail, postage prepaid) true copies of this Notice of Filing to the persons entitled thereto, addressed as shown above.

GALE S. ENSTAD
County Clerk and ex Officio Clerk
of the Superior Court

By C. S. RING....., Deputy
C. S. Ring

Dated: October 5, 1982.....

Clerk 580 2170 AP-2(IM 4-79)

Office - Supreme Court, U.S.
FILED
APR 13 1983
ALEXANDER L. STEVAS,
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No. 82-976

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROSCOE HOWARD, JR.,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a California Fifth District Court of Appeal determination that the prosecution did not establish the voluntariness of respondent's confession beyond a reasonable doubt be overturned?

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ARGUMENT

THE REVIEWING COURT'S FINDING THAT RESPONDENT'S CONFESSION WAS INVOLUNTARY IS BASED ON THE LAW OF THE STATE OF CALIFORNIA

The California Supreme Court has made clear that state law requires the prosecution to prove a defendant's confession to be voluntary beyond a reasonable doubt. Justice Manuel in People v. Jimenez (1978) 21 Cal. 3d 565, 602; [145 Cal. Rptr. 172;

580 P. 2d 672] considered and rejected the lesser federal standard of proof by a preponderance of the evidence.

> "In 1972, however, the Supreme Court held, in Lego v. Twomey (1972) 404 U.S. 477 [30 L. Ed. 2d 618; 92 S. Ct. 619], that for purposes of the federal Constitution, the prosecution need only prove the voluntariness of a confession by a preponderance of the evidence.
>
> "In People v. Tewksbury (1976) 15 Cal. 3d 953, 965, fn. 10 [127 Cal. Rptr. 135, 544 P. 2d 1335], this court, noting the disparity in result between Lego and the pre-Lego California decisions, expressly left open the question which we now decide-whether California law requires a standard of proof stricter than that required by the federal Constitution.

The basis for the Fifth District Court of Appeal's decision is state law. Where there is no conflicting testimony on the Miranda issue the reviewing court must independently determine that defendant's incriminating statement was voluntary and properly admitted. (People v. Murtishaw 29 Cal. 3d. 733, 753.) California Evidence

Code section 405 requires the trial court to make a determination of admissibility of a confession outside the presence of the jury. By judicially declared rule of criminal procedure said finding must be made by a reasonable doubt standard. (See People v. Jiminez, supra, at 605.)

The California State Supreme Court did not decide whether the California State Constitution requires proof of voluntariness by a reasonable doubt standard in Jiminez. The Court, however, did not reject such a finding. It is not unusual for the California Supreme Court to find an independent basis for exclusion of confessions in the California Constitution. The use of a defendant's statement for impeachment purposes pursuant to Harris v. New York 401 U.S. 222, has been specifically rejected as being inconsistent with the values embodied in the California State

Constitution.

People v. Disbrow (1976) 16 C. 3d 101, 113; [127 Cal. Rptr. 360; 545 P. 2d 272] reads, in part, as follows:

> "We therefore hold that the privilege against self-incrimination of article I, section 15, of the California Constitution precludes use by the prosecution of any extrajudicial statement by the defendant, whether inculpatory or exculpatory, either as affirmative evidence or for purposes of impeachment, obtained during custodial interrogation in violation of the standards declred in Miranda and its California progeny. Accordingly, we overrule Nudd and declare that Harris is not persuasive authority in any state prosecution in California.

The Appellate Court's decision in the instant case is predicated on the California Supreme Court's judicially declared rules, the California Evidence Code, the California State Constitution and the case law of the State of California.

The Fifth District Court of Appeals correctly applied the case law of the State

of California in determining that respondent's confession was not proven to be voluntary beyond a reasonable doubt. The Appellate Court relied on the four factor test of People v. Herdan (1974) 43 C.A. 3d 300; [116 Cal. Rptr. 641] in deciding that respondent should have been given Miranda rights prior to police interrogation. In the instant case the reviewing court relied on the totality of the circumstances in addition to the four factor analysis of Herdan. In Herdan the Court makes clear that the four factors are "among the most important" in requiring the advisal of Miranda rights.

The length and form of questioning suggest that the primary police purpose for interviewing Howard was to elicit incriminating statements. Unlike Oregon v. Mathiason (1976) 429 U.S. 494, the police had reliable independent information that

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respondent was involved in attempted robbery and homicide. Investigation had focused on respondent as a suspect prior to his interview largely because the police had interviewed co-defendant Terry Beheler before contacting respondent. In two California Supreme Court cases a defendant's confession had been held inadmissible where the defendant has voluntarily gone to the police station (People v. Arnold 66 Cal. 2d 438; People v. White 69 Cal. 2d 751).

The court in Arnold recognized the psychologically coercive nature of interrogation designed to elicit incriminating responses in a police controlled environment.

In People v. Arnold, supra, at page 447, the Court states, in part, as follows:

> "The vice of the custodial interrogation which these cases condemned lay in the psychological coercion implicit in interrogation in the isolated chamber from which the

> suspect may reasonably believe he cannot leave. In such circumstances the person detained or arrested finds himself completely and suddenly cut off from freedom of movement. An involuntary immobilization by law enforcement officers dramatizes the fact that the individual stands suspected or accused of crime. Lacking knowledge of his constitutional rights, he may feel that he can extricate himself from the situation only by submitting to interrogation.

The totality of circumstances in the instant case is similar to Arnold. Respondent was asked a series of incriminating questions in a one-on-one police interview. Howard was not advised of the seriousness of the situation, the law of aiding and abetting, the fact that the police were interested in charging defendant with first degree murder, or his right to consult with an attorney prior to interview.

This court's summary opinion in Oregon v. Mathiason is distinguishable. The primary distinction from Mathiason is the fact that the Fifth District Court of

Appeal's decision is based on the case law of the State of California, the California State Constitution, and judicial rules and principles of law enunciated by the California Supreme Court. No independent state ground existed in the Mathiason case.

The California Supreme Court has advocated strong policy reasons against the admission of involuntary confessions. Justice Manuel, in People v. Jiminez, supra, at page 605, eloquently articulates the judicial policy of the State of California and the value system underlying California's deviation from United States Supreme Court constitutional construction as follows:

> "The privilege against self-incrimination, which is guaranteed by both the federal and California Constitution, protects an accused against product of a rational intellect and a free will. . ."
>
> "The high value that our system of justice places on this right of the accused to be free from compulsory self-incrimination is reflected in

the special safeguards that have been designed to preserve that right. . ."

Further, at page 606, the Court states:

". . .[U]nder the preponderance of the evidence test, a trial court will more often resolve factual conflicts in the evidence in favor of admitting a challenged confession, and this will correspondingly increase the risk that some involuntary confessions will thereby be admitted. The contrary result would obtain, however, if the reasonable doubt standard were applied, and this would thus decrease the risk that involuntary confessions would be admitted. (See Lego v. Twomey, supra, at p. 493 [30 L. Ed. 2d at pp. 629-620].)

"Given the strong policies underlying the privilege against self-incrimination, which require exclusion of any coerced confession, and which mandate automatic reversal of a conviction whenever a coerced confession has been used against the accused at trial, it is apparant that the standard of proof for determining the admissibility of confessions in the first instance should be that standard which minimizes the risk to the greatest extent possible, that a coerced confession will be admitted into evidence at trial. There is an additional reason for requiring the reasonable doubt standard. We have said that the more serious the consequences resulting from an erroneous determination of the issue involved, the stricter will be the standard of proof that is required (People v.

Burnick 14 Cal. 3d 306). The consequences reuslting from an erroneous determination of the voluntariness issue are especially severe, because the trial court's decision is almost always determinative of the issue. . ."

"We are also persuaded that application of the reasonable doubt standard in determining the admissibility of a confession may, in some instances, have a salutary effect on the ultimate fact-finding process by reducing the possibility that coerced confessions in general will be admitted and thereby the possibility that coerced false confessions will be admitted. . ."

"Although a defendant must be allowed to present such evidence of coercion to show why his confession should not be believed, he is not, however, necessarily assured that in so doing he will prevail. For it cannot be denied that a confession, which admits every element of the prosecution's case, is ordinarily given overwhelming weight by the jury, and therefore, the defendant may not always be able to convince the jury to disregard this most devastating evidence of his guilt which emanated from his own mouth (People v. Stroud (1969) 273 Cal. App. 2d 670, 678 [78 Cal. Rptr. 270], even when this evidence should, in fact, be viewed with distrust. . ."

The Fifth District Court of Appeal's decision is soundly founded upon the law of the State of California. The decision should be affirmed.

Respectfully submitted,

EUGENE R. LORENZ

Attorney for Respondent.

STATE OF CALIFORNIA)
) ss.
COUNTY OF KERN)

EUGENE R. LORENZ, being duly sworn, deposes and says: That affiant is over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 1227 California Avenue, Bakersfield, Calfiornia 93304; that on the 1st day of April, 1983, affiant enclosed ____ true copy/copies of the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited it in the United States Mail at the City of Bakersfield, County of Kern, State of California, with postage thereon fully prepaid; that there is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed:

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Subscribed and sworn to before me
this 1st day of April, 1983.

Notary Public, County of Kern
Irene B. Thomas

OFFICIAL SEAL
IRENE B. THOMAS
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
KERN COUNTY
My Commission Expires Mar. 29, 1985

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PROOF OF MAILING--AFFIDAVIT

I, EUGENE R. LORENZ, the attorney for Roscoe Howard, Jr., respondent herein, hereby certify that on the 1st day of April, 1983, I deposited in the United States Post Office located at 1730 18th Street, Bakersfield, Calfiornia, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filng, the foregoing Brief In Opposition To Petition For Writ of Certiorari.

EUGENE R. LORENZ
Attorney for Respondent

Subscribed and sworn to before me at Bakersfield, California, this 1st day of April, 1983.

Irene B. Thomas, Notary Public
State of California

OFFICIAL SEAL
IRENE B. THOMAS
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
KERN COUNTY
My Commission Expires Mar. 29, 1985

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REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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THE OPINION OF THE FIFTH DISTRICT
COURT OF APPEAL REVERSING RESPONDENT'S
FIRST-DEGREE MURDER CONVICTION IS
PREDICATED ON FEDERAL LAW, NOT STATE LAW

Respondent argues that the reversal of his conviction for first degree murder by the California Fifth District Court of Appeal is based on state grounds rather than federal law. Not so.

The issue in this case is whether or not respondent was "in custody" within the meaning of this Court's opinion in Miranda v. Arizona (1966) 384 U.S. 436. To determine "custody," California courts have always purported to rely on the definition of "custody" in the Miranda opinion. The opinion of the California Supreme Court in People v. Arnold (1967) 66 Cal.2d 438 speaks for itself:

> "Accordingly, we adopt the definition of the United States Supreme Court of in-custody interrogation: 'By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Italics added.) [Miranda v. Arizona.]

(384 U.S. at p. 444.)" (Id., at 448.)

Since Arnold, courts have held repeatedly that California follows the definition of "custody" first pronounced by this Court in Miranda. (In re Deborah C. (1981) 30 Cal.3d 125, 130 fn. 1; People v. Ceccone (1968) 260 Cal.App.2d 886, 892; People v. Hazel (1967) 252 Cal.App.2d 412, 417 fn. 2; People v. Aikens (1977) 72 Cal.App.3d Supp. 11, 15-16 Lowe v. United States (9th Cir. 1969) 407 F.2d 1391, 1396-1397.)

The opinion in this case is obviously based on federal grounds. The state appellate court does not cite any state constitutional provision nor any other state law as an "independent" basis for its decision. (Oregon v. Hass (1975) 420 U.S. 714, 719-720; Fare v. Michael C. (1978) 439 U.S. 1310, 1315 (Rehnquist, J., Circuit Justice).) Furthermore, other California

cases have distinguished Mathiason (People v. Farris (1981) 120 Cal.App.3d 51, 56), thus revealing the federal basis for their decision. (Oregon v. Hass, supra, at 719-720.) 1/

Finally, it is not a matter of California judicial policy to adopt independent state grounds on Fifth Amendment issues. (People v. Prysock (1982) 127 Cal.App.3d 972, 986-987.) On any particular issue, the California Supreme Court has been explicit and deliberate in adopting a standard different from the federal. (See,

---

1. Petitioner calls the Court's attention to the lower court's opinion reversing the first-degree murder conviction of respondent's codefendant, Jerry Beheler. In that case, the court also reversed on Miranda grounds and went to great lengths to distinguish Oregon v. Mathiason (1976) 429 U.S. 492, thus revealing the federal basis of its decision. (Oregon v. Hass, supra, 420 U.S. at 719-720.) The opinion in People v. Beheler (5 Crim. 5136; Kern County No. 20967) is attached to petitioner's application for stay on file with this Court (A-719) and also with the petition for certiorari filed with this Court on March 7, 1983 (No. 82-1666).

e.g., People v. Jimenez (1978) 21 Cal.3d 595, 605-609; People v. Pettingill (1978) 21 Cal.3d 231, 246-252; People v. Disbrow (1976) 16 Cal.3d 101, 113.) However, since Arnold, the California high court has never initimated that California defined "custody" more broadly than this Court in Miranda v. Arizona, supra.

Indeed, this is precisely petitioner's contention -- that the court below, like the Oregon court in Mathiason, has read the Miranda requirements too broadly by considering extraneous and irrelevant factors in determining custody. (Oregon v. Mathiason, supra, 429 U.S. at 493.)

Respondent's attempts to distinguish Mathiason merely obfuscate the issue. The fact that California has adopted a higher standard of proof, the reasonable doubt standard, for determining the voluntariness of a confession is irrelevant. Neither Mathiason nor the instant case are

standard of proof cases. Rather, they both concern a judicial interpretation of Miranda which extends its requirements beyond situations in which a suspect is subjected to the inherently compulsive pressure of interrogation while being in actual police custody. Petitioner's quarrel is not with the standard of proof, but with the factors considered by the court below in determining "custody." Nothing in the California cases implies that the State Supreme Court's adoption of the reasonable doubt standard meant an expansion of the definition of "custody" for Miranda purposes.

The fact that the police did not advise respondent of his rights prior to talking to him did not mean that he was unfairly tricked or forced into incriminating himself. Miranda is not a game, the object of which is to discourage confessions. (Miranda v. Arizona, supra, 384 U.S. at 477-478.) It does not matter that the

respondent might be unaware of the seriousness of his situation or the legalities involved. (People v. Mitchell (1982) 132 Cal.App.3d 389, 405; People v. Neely (1979) 95 Cal.App.3d 1011, 1017; United States v. Campbell (9th Cir. 1970) 431 F.2d 97, 99 fn. 1; State v. Carter (S.C. 1979) 250 S.E.2d 263, 267-268 and cases cited therein; see also Collins v. Brierly (3d Cir. 1974) 492 F.2d 735, 738; People v. Williams (1981) 30 Cal.3d 470, 491.) The level of suspicion harbored by the police questioning respondent and the nature of their questioning are also beside the point. (Oregon v. Mathiason, supra, 429 U.S. at 495-496; Beckwith v. United States (1976) 425 U.S. 341, 345.)

The critical question is whether respondent was deprived of his freedom of action in any significant way during his police interview. Only then, would he be subject to the inherent compulsion to incriminate himself condemned by the Fifth

Amendment and cured by the Miranda advisements. As the lower court itself found respondent, willingly contacted the police and confessed. He offered to talk after another accomplice, Beheler, advised him he would not be held. He left the police station after a 12 minute interview. He did not even believe he was in custody. He was right. Thus, respondent was never subject to the inherent coercion of "custody," the situation that must be present to trigger the Miranda requirements. He was not compelled to incriminate himself and no Fifth Amendment violation occurred.

Certainly, there was nothing about his interview which intruded on the two central values of the Fifth Amendment protection against self-incrimination -- the dignity of the individual and the integrity of the fact-finding process. (Miranda v. Arizona, supra, 384 U.S. at 460, 466.) Respondent's decision to speak was not made under circumstances in which his will to

resist and freedom of choice were nullified by his being controlled or restrained under the authority of the police.

The opinion below analyzes "custody" as a balancing test of location, focus, restraint, and interrogation. Mathiason rejected such a "coercive environment" analysis because it expanded the Miranda requirements to include police-suspect encounters that did not involve the compulsion of being in police custody. In short, the opinion of the Califoria Fifth District Court of Appeal impermissibly imposes greater restrictions on the police as a matter of federal constitutional law when this court has specifically refrained from imposing such restrictions. (Oregon v. Hass, supra, 420 U.S. at 719.)

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/ / /

Respondent's argument should be rejected and the petition should be granted.

Respectfully submitted,

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The People of the State of California, the petitioner in this proceeding, respectfully petitions for rehearing of the order of the Court entered on April 30, 1984 denying the petition for writ of certiorari to the Court of Appeal of the State of California, Fifth Appellate District. Rehearing is justified on the grounds of "intervening circumstances of

substantial or controlling effect" and "other substantial grounds not previously presented". (Rule 51.2, Rules of the United States Supreme Court.)

REASONS FOR GRANTING PETITION FOR REHEARING

REHEARING OF THIS CASE IS NECESSARY TO SECURE UNIFORMITY OF DECISION AND TO PROMOTE THE INTERESTS OF JUSTICE.

On April 30, 1984 this Court denied the petition for writ of certiorari in the above-entitled matter. In so doing, it let stand a California decision reversing respondent's murder conviction on the ground that critical evidence, his confession, should have been excluded from his trial pursuant to Miranda v. Arizona (1966) 384 U.S. 436. Petitioner submits that a rehearing of its petition in this matter is now necessary to secure uniformity of decision and promote the interests of justice in light of this Court's opinion in the case

of respondent's accomplice, Jerry Beheler (California v. Beheler (1983) ____U.S.____ [103 S.Ct. 3517, 77 L.Ed.2d 1275] and subsequent California appellate decisions in People v. Beheler (1984) 153 Cal.App.3d 242 and People v. Dillon (1983) 34 Cal.3d 441.

This Court's Beheler opinion was issued subsequent to the filing of the petition in the instant case. Thus, petitioner has not had the opportunity to argue the similarities between the Beheler case and the instant case. Such an examination quickly demonstrates that Beheler should have been dispositive.

Both men were interviewed at a police station after voluntarily contacting the police about their involvement in the felony-murder of Peggy Dean. 1/ Neither of them were advised

1/ This discussion of facts is based on this Court's statement in California v. Beheler, supra, 103 S.Ct. at 3518, 77 L.Ed.2d at 1277-1278, as well as the summary of facts in the original lower court opinions in respondent's and Beheler's cases. These latter two opinions are attached to this petition as appendices A and B, respectively.

of their constitutional rights pursuant to Miranda v. Arizona, supra, prior to their brief interviews, but both returned home after talking to the police. In subsequent interviews, both men agreed that they had voluntarily talked to the police in the first interviews. Respondent also agreed that he had not been "in custody" during the first interview.

In reversing their convictions, the California Court of Appeal concluded that the initial interviews of Beheler and respondent were both "custodial interrogations" and that they should have been advised of their constitutional rights under Miranda v. Arizona, supra. In so concluding, the court found it significant that the interviews occurred at a police station, that the two men were suspects in the Dean murder, and that their interviews were "interrogations". Yet, in both cases, the lower court concluded that neither Beheler nor the respondent were under arrest. (App. A at pp. 21-35, App. B at

pp. 18-37.)

This Court concluded that the lower court's reversal of Beheler's conviction was "in conflict" with long-settled decisions. (Rule 17.1(c), Rules of the United States Supreme Court; California v. Beheler, supra, 103 S.Ct. at 3518; 77 L.Ed.2d at 1277.) It rejected the lower court's effort to "distinguish" Beheler's case from Oregon v. Mathiason (1976) 429 U.S. 492. (California v. Beheler, supra, 103 S.Ct. at 3519; 77 L.Ed.2d at 1279.) This Court upheld Beheler's conviction by explaining that the "ultimate inquiry" in determining whether a suspect is "'in custody' for purposes of receiving Miranda protection . . . is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest". (California v. Beheler, supra, 103 S.Ct. at 3520, 77 L.Ed.2d at 1279) (citation omitted).

Likewise, respondent was neither under

arrest nor its equivalent at the time he confessed. Indeed, the lower court concluded that "indicia of arrest were not present" in respondent's case while in Beheler's case it merely concluded that there was "little indicia of arrest". (Compare App. A at p. 30 with App. B at p. 33.)

Furthermore, it is irrelevant that the police knew more about respondent's involvement in the Dean murder than Beheler's, since respondent initiated the police contact and was not otherwise in custody. (California v. Beheler, supra, 103 S.Ct. at 3520, 77 Cal.Ed. 2d at 1280.) It is true, of course, that respondent knew the police wanted to talk to him and that the police never specifically advised him that he was not under arrest. However, it is undisputed that respondent voluntarily contacted the police because he did not believe he would be held in custody. (App. A at p. 16.)

Truly, under the lower court's own analysis, the facts of this case are even more compelling than Beheler's that respondent was not subjected to the "inherent coercion" of a "custodial interrogation" as described in Miranda v. Arizona, supra. Even if this Court was simply to remand respondent's case in light of California v. Beheler, supra, his conviction would be upheld. 2/

Petitioner is aware, of course, that review by certiorari is not a matter of right. (Rule 17.1, Rules of the United States Supreme Court.) This Court has chosen to make its point about the limits of its Miranda decision by hearing Beheler's case and not respondent's. However, the identity of respondent's and Beheler's case is not the only reason that

2/ It should be noted that the lower court has rejected any attempt to ignore California v. Beheler, supra, on "independent state grounds." (People v. Beheler, supra, 153 Cal.App.3d at 246.)

this petition should be granted. Related developments in the Beheler case also demonstrate the necessity for upholding respondent's conviction.

This Court's treatment of respondent's case could have a direct impact on the ultimate disposition in Beheler's case. As already noted, Beheler's murder conviction has now been affirmed by the California Court of Appeal. However, pursuant to People v. Dillon, supra, the same court has modified Beheler's murder judgment to voluntary manslaughter. (People v. Beheler, supra, 153 Cal. App.3d at 260-261.)

Following Dillon, the California Court of Appeals rejected an attack on California's first degree felony-murder rule, but chose to reduce Beheler's conviction from first degree murder to voluntary manslaughter under cruel and unusual punishment principles. (People v. Beheler, supra, 153 Cal.App.3d at 260-261.)

This feat was accomplished through an analysis of the facts and circumstances of Beheler's offense, including a comparison of his punishment with that of his accomplices. 3/ The appeals court noted that respondent in this case received the same sentence as Beheler, life without the possibility of parole, but also opined that respondent "was more culpable than Beheler because Howard provided the murder

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3/ This entire approach to proportionality review under the "cruel and/or unusual punishment" clauses may appear both surprising and startling. California courts are ignoring the wise counsel of this Court in Solem v. Helm (1983) ___ U.S. ___ [103 S.Ct. 3001, 3009 fn. 16, 3010 fn. 17, 77 L.Ed.2d 637, 649 fn. 16 817]; Rummel v. Estelle (1980) 445 U.S. 263, 284 and Coker v. Georgia (1977) 433 U.S. 584, 592 and are now embarked on a subjective, case-by-case review of the proportionality of all felony-murder sentences in California. Such review includes comparing the sentences received by accomplices to the same crime such as Beheler and respondent in this case. In People v. Dillon, supra, the California Supreme Court reduced a defendant's conviction to second degree murder. As part of its analysis, the state high court found it significant that none of the defendant's accomplices served any time. (34 Cal.3d at 488.)

weapon and was not as inebriated as Beheler." (Id. at 258-259.)

On the same day this Court denied certiorari in respondent's case, Beheler filed a petition for hearing with the California Supreme Court (attached as App. C) requesting that his conviction now be further reduced! He sought to have his case remanded to the California Court of Appeals for reconsideration of his sentence "since a more culpable co-defendant [respondent Howard] has received a lighter disposition" (App C. at p. 2) On May 17, 1984 the California Supreme Court denied Beheler's petition. However, such a denial will not preclude other collateral attempts by Beheler to lower his sentence. (See, e.g. In re Foss 10 Cal.3d 910, 916; People v. Cooper (1984) 153 Cal.App.3d 480, 482 fn. 1.) 4/

4/ Petitioner will provide a certified copy of the California Supreme Court's order in People v. Beheler, supra, as soon as possible.

Thus, Beheler, has and could continue to attempt to additionally decrease the measure of his culpability by relying on the prospect that respondent may go free due to this Court's denial of certiorari. The end result could be that two murders will serve minimal time for the murder they undoubtedly committed. Certainly, their punishments will be in no way proportionate to the crime of first degree murder nor in relation to each other.

It has been indicated that petitions for rehearing to this Court are not "an empty formality" and that denial of certiorari does not necessarily signal approval of a lower court opinion. (Flynn v. United States (1955) 75 S.Ct. 285, 286 (Frankfurter, J., Circuit Justice) cited in United States v. Ostrer (S.D. N.Y. 1976) 422 F.Supp. 108, 109.) Previously, petitions for rehearing have been granted to secure uniformity of decision and promote

"interests of justice." (See, e.g. Gondeck v. Pan American Airways (1965) 382 U.S. 25, 26-27; United States v. Ohio Power Co. (1957) 353 U.S. 97, 98-99 and cases cited therein; Massey v. United States (1934) 291 U.S. 608, 609-610.)

This Court's decision to neither hear nor remand respondent's case affects not just respondent's case, but Beheler's as well. The prosecution has been deprived of evidence essential to convict an unquestionably guilty man since it was respondent's confession which corroborated the testimony of accomplice witness Daniel Chavez. Moreover, while respondent benefits from an unwarranted and faulty extension of Miranda v. Arizona, supra, the man whose conviction this Court did uphold in California v. Beheler, supra, remains in prison and tries to further artificially deflate his sentence.

Petitioner respectfully submits that this Court should rehear the respondent's case and

grant the petition for writ of certiorari. This Court should either reverse the decision of the California Fifth District Court of Appeal below or remand this case to that court in light of California v. Beheler, supra.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I, Ward Allen Campbell, a Member of the Bar of the United States Supreme Court, do hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 51.2 of the Rules of the United States Supreme Court.

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APPENDIX A

Copy of Opinion Issued by Fifth District Court of Appeal of the State of California in People v. Howard, 5 Crim. 5181 (filed July 16, 1982)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,	) 5 Crim. No. 5181
Plaintiff and Respondent,	)
v.	) (Super.Ct.No. 20967)
ROSCOE HOWARD, JR.,	) O P I N I O N
Defendant and Appellant.	)

APPEAL from a judgment of the Superior Court of Kern County. Walter Osborn, Jr., Judge. Reversed.

Chain, Younger, Jameson, Lemucchi, Busacca & Noriega, James E. Noriega, and Eugene R. Lorenz, for Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Roger E. Venturi and Ward A. Campbell, Deputy

Attorneys General, for Plaintiff and Respondent.

--ooOoo--

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664/211 and 187).

Appellant, Roscoe Howard, Jr., and codefendants were charged with violations of Penal Code sections 664/211 (attempted robbery) and 187 (murder). As a special circumstance it was alleged that appellant was either engaged in, or was an accomplice to, an attempted robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(i). It was also alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a).

The court granted separate trials for appellant's codefendants.

The jury found appellant guilty on both counts and found the alleged special circumstance and enhancement to be true.

These are the facts:

Daniel Chavez, one of the original codefendants in appellant's case, was granted immunity and testified against appellant.

On February 20, 1980, appellant, Daniel Chavez, and Jerry Beheler drove to Beheler's Bakersfield home. Appellant had in his possession his father's 357 magnum and he agreed with the others that it would be possible to "take" some hashish from a woman at the Palms Liquor Store.

At Beheler's house, Danny Wilbanks joined the three in planning the robbery. Wilbanks began to handle appellant's gun, which had been lying on the table. He

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removed the bullets from the gun, and said he only needed one bullet, and then reloaded the gun. Appellant retrieved the gun, replaced it on the table, and warned Wilbanks not to play with it. Chavez and appellant wanted to use the gun to bluff the robbery victim only. However, they concurred that the gun might be necessary as protection against a friend of the woman's who had a knife.

Using Beheler's car, Wilbanks drove the other three to the liquor store. Appellant's gun rested on his lap. Appellant cautioned Wilbanks that the gun did not have a safety and that no one was to be killed. The plan was to leave if the woman did not give them the hashish.

After the three entered the store's parking lot, a woman, Peggy Dean, approached them. She stated that she had not expected them and then handed Wilbanks

a tinfoil package. She saw the gun and inquired as to its purpose. Chavez said it was for protection. She indicated she had 12 more "grams." Other foil packages were visible in her hands. Wilbanks pointed the gun at her and demanded the rest of the hashish. She said she did not think he would fire the gun. However, despite appellant and Chavez' protests, Wilbanks shot her once. The four men then drove away.

Appellant gave Wilbanks instructions on how to return to Beheler's house. Appellant also regained possession of the gun at this time. Upon their arrival at Beheler's house, appellant hid the gun in the back yard and left with Chavez through a back gate. Appellant threw the gun's remaining bullets away.

At trial Kern County Deputy Sheriff Lantz testified that he interviewed Jerry

Beheler. Beheler identified Wilbanks as the shooting perpetrator and also told the deputy he thought the gun was in his back yard. Additionally, he indicated that two other people were also present during the incident, naming appellant and Chavez.

Lantz was directed to transport Beheler to the sheriff's department. On their way, Lantz asked Beheler to point out the homes of the other two "witnesses" and Beheler complied by showing him appellant's and Chavez' homes. Lantz knocked on appellant's door, but neither appellant nor Chavez answered. Lantz then contacted Chavez' father next door and left word that the police wanted to talk to his son.

After finding the gun hidden in Beheler's back yard, sheriff's investigator Ray interviewed Beheler. Beheler

admitted he had gone to the scene of the crime in order to rob the decedent. He also stated appellant went along "for the ride" and had nothing to do with the robbery.

The next morning, at the urging of Chavez' father and Beheler, appellant and Chavez called the sheriff's department. They were transported to the sheriff's department for interviews. In this interview, appellant admitted the gun was his father's, but initially stated that he had loaned it to either Wilbanks or Beheler for target practice only. He denied any intent to rob the victim, but admitted knowing that Wilbanks planned to rob her. However, he then admitted that Beheler had wanted the gun for use in the robbery and that he (appellant) knew that. He also denied

knowing the gun's whereabouts. He further denied any knowledge of Wilbanks' apparent design to shoot the victim and maintained that he planned to contact the police despite being scared. Upon completion of the interviews, appellant and Chavez were transported back to their homes by the sheriff's department.

Appellant was arrested several days later. At this time he was given his Miranda rights and was re-interviewed. He told Detective Ray that he and Beheler had procured the gun from appellant's house to rob the victim. Appellant and Chavez agreed only to use the gun as a bluff. He admitted that he and Chavez had hidden the gun.

An autopsy revealed that Peggy Dean died of a gunshot wound to the head.

Appellant testified in his own behalf.

He claimed he was just going along for the ride the night Danny Wilbanks shot Peggy Dean. He denied any complicity in her murder and any knowledge of Wilbanks's actual intent to rob her, but admitted his participation in discussion of a plan to rob her by bluffing with his father's gun. He admitted assisting in hiding the gun and bullets.

At trial, the People moved for admission of appellant's statements made to a sheriff's investigator on February 21 and 26, 1980. A hearing on this motion was held and the court granted the motion to admit appellant's statements. The facts developed at this hearing are as follows:

On February 20, 1980, Kern County Deputy Sheriff Lantz responded to a call at Palms Liquor Store in Bakersfield. Upon his arrival he found the body of the decedent, Peggy Dean. Lantz was directed

by the desk officer to a home about a block and a half away from the liquor store. Lantz talked to Jerry Beheler.

Beheler told Lantz that his half-brother, Danny Wilbanks, shot Dean. He knew where the gun was, but did not explain how Wilbanks got it. Beheler further told the officer that appellant and Chavez were also present.

Lantz was instructed to transport Beheler to the sheriff's department. He was told that he was not under arrest.

At Lantz' request, Beheler showed Lantz appellant's and Daniel Chavez' residences. No one answered the door at appellant's house, but Lantz talked to Angelo Chavez, Daniel's father, at the Chavez home. Lantz told Mr. Chavez that if he should be contacted by his son, he should tell his son to contact the sheriff's office as soon as possible as

they were interested in asking him questions because they had information his son had been present at a shooting.

Before Beheler was interviewed at the sheriff's office, sheriff's investigator Ray found a handgun hidden in Beheler's back yard.

Ray taped an interview with Beheler in which Beheler told him that he and three others, including appellant, had gone to the liquor store to rob Dean of hashish and that appellant had provided a gun to Wilbanks for that purpose. He also told Detective Ray that Chavez and appellant had left his house on foot and they seemed worried and scared.

By the end of the interview, Ray considered appellant and Beheler as possible murder suspects. Beheler was allowed to leave. He had been neither arrested nor restrained. As Beheler

left, Ray asked him to tell appellant and Chavez to contact the sheriff's department if possible.

The following day Chavez called Detective Ray and indicated that he and appellant would talk to the police. Chavez' father had urged them to call the police. Beheler also contacted them and advised them to call the police because he felt the police only wanted statements and were after Wilbanks.

Detective Ray sent a deputy to pick up appellant and Chavez at their respective residences. Ray conducted a 12-minute interview with appellant. Appellant told Ray that Beheler had gotten the gun from him to rob Peggy Dean. At that point, Ray testified that he considered appellant a suspect. This interview was taped. At no time during this interview did Detective Ray advise appellant of his Miranda

Miranda rights. After interviewing appellant and Chavez, Detective Ray released them and provided them transportation home. No arrests were made at that time. After the interview, Detective Ray told each of the individuals they should stay around town. Detective Ray indicated he wanted members of the district attorney's office to read the transcribed statements and make a decision as to whether an arrest would be made. He admitted this was not normal procedure in homicide cases.

An all-points bulletin was broadcast for the arrest of Daniel Wilbanks on February 21, 1980. Appellant, Beheler and Chavez remained at large after they had each given their taped interviews to the detectives. Later in the evening on February 21, 1980, Daniel Wilbanks turned himself in at the sheriff's office

in Lancaster. On February 25, 1980, a warrant for the arrest of the other three participants, including appellant, was issued and they were arrested on February 26, 1980. After their arrest each gave a second taped statement to the detectives. At this time each was advised of his constitutional rights. They each waived them and gave full statements concerning the instant case.

I

Appellant's primary contention on appeal is that the court erred when it admitted the statements of appellant because appellant had not been advised of his Miranda rights during the February 21st interview. Appellant contends that pursuant to Miranda v. Arizona (1966) 384 U.S. 436, appellant was in custody during the February 21st interview and thus entitled to have the Miranda admonitions. Furthermore, appellant contends

that custody arises, at the "latest," at the point when the investigating officer has probable cause to believe that the person being questioned has committed an offense. Appellant apparently contends that the police had probable cause to arrest appellant prior to the time of the February 21st interview and that consequently it was necessary that appellant be given his Miranda rights before any interrogation.

Respondent's primary argument is that appellant was not entitled to Miranda admonitions during the February 21st interview because he was not in custody.

In Miranda v. Arizona, supra, 384 U.S. 436, 467-473, the United States Supreme Court held that to insure that any statement a suspect makes in a custodial interrogation setting is a product of his free will, the interrogation

must be surrounded by certain essential procedural safeguards:

> "[B]efore any questioning begins the police must give the suspect the now-familiar 'Miranda warnings,' advising him primarily of his right to remain silent and to have the assistance of counsel . . .; to be valid, any waiver thereof must be both knowing and intelligent; and the questioning must terminate if the suspect directly or indirectly invokes any of these rights." (People v. Pettingill (1978) 21 Cal.3d 231, 237.)

The reason for Miranda's requirement of express advisement of rights is to dispel the coercion inherent in an environment of incommunicado-police-dominated interrogation. (Miranda, supra, at pp. 457-458.) The prosecution has the burden of establishing the voluntariness of a defendant's statement beyond a reasonable doubt. (People v. Jimenez (1978) 21 Cal.3d 595.) Absent proof beyond a reasonable doubt of proper advisement and valid waiver of

rights, any admission or confession obtained is deemed coerced. (People v. Murtishaw (1981) 29 Cal.3d 733, 753, mod. 29 Cal.3d 836a.) The trial court's ruling on a Miranda issue may not be set aside by an appellate court unless it is "palpably erroneous." (In re Eric J. (1979) 25 Cal.3d 522, 527.) Also, as to conflicting testimony, the appellate courts must accept the version of events most favorable to the People to the extent that it is supported by the record. (People v. Jackson (1980) 28 Cal.3d 264, 300; People v. Jimenez, supra, 21 Cal.3d 595, 609.) However, where the facts are uncontradicted, the reviewing court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753;

People v. Jimenez, supra, 21 Cal.3d at p. 609.)

A succinct summary of when the procedural safeguards as set out in Miranda come into play is found in People v. Murphy (1982) 127 Cal.App.3d 743, 747-748:

> "The procedural safeguards set out in Miranda protecting the Fifth Amendment right against self-incrimination come into play only when 'custodial interrogation is involved. (384 U.S. at p. 444 [16 L.Ed.2d at pp. 706-707]; People v. Farris (1981) 120 Cal.App.3d 51 [174 Cal.Rptr. 424]; People v. Blouin (1978) 80 Cal.App.3d 269, 283 [145 Cal.Rptr. 701].) 'Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."' (Oregon v. Mathiason (1977) 429 U.S. 492, 495 [50 L. Ed. 2d 714, 719, 97 S.Ct. 711].) 'While arrest is not a condition precedent to the right to Miranda and Dorado [People v. Dorado (1965) 62 Cal.2d 338, 358-364 (42 Cal. Rptr. 169, 398 P.2d 361)] warnings, custody is: the vice requiring the prophylaxis of the notice of rights is the inherently coercive atmosphere pervading custodial interrogation. [Citation.]' (People v. Leach (1975 15 Cal.3d 419, 443

[124 Cal.Rptr. 752, 54 P.2d 296].)

"Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Miranda v. Arizona, supra, 384 U.S. at p. 444 [16 L.Ed.2d at p. 706].) In California, it is well settled that custodial interrogation can occur without a formal arrest. It exists where the defendant is either 'physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.' (People v. Arnold (1967) 66 Cal.2d 438, 448 [58 Cal. Rptr. 115, 426 P.2d 515]; People v. Farris, supra, 120 Cal.App.3d at p. 56.) It has been said: 'When an arrest has not yet taken place, the factors considered in deciding whether custody has attached are many. Among the most important are: (1) the site of the interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.' (People v. Herdan (1974) 42 Cal. Cal.App.3d 300, 306-307 [116 Cal. Reptr. 641], fns. omitted; see also People v. Blouin, supra, 80 Cal.App.3d at p. 283; People v. Arnold, supra, 66 Cal.2d at p.

at p. 449.)" 1/

Whether appellant was in custody during the initial questioning is the central issue in this case. The test of custody is not dependent upon the subjective intent of the interrogator. As noted above, the question is "whether the suspect was actually deprived of his

1/ Prior to Miranda, courts focused on the factor of whether the investigation had begun to focus on a particular suspect. (Escobedo v. Illinois (1964) 378 U.S. 478; People v. Durado (1965) 62 Cal.2d 338.) Since Miranda, however, the test simply is whether the suspect is in custody. Focus on the suspect, however, remains an element in deciding whether custody has taken place. (See People v. Murphy, supra, 127 Cal.App. 3d 743, 747-748, and cases cited therein.)

Also, it should be noted that although persons temporarily detained for investigation of crimes are actually deprived of their freedom of movement for the period of the detention, an investigatory on-the-scene detention does not constitute "custody" for the purposes of Miranda. (Miranda v. Arizona, supra, at pp. 477-478; People v. Patterson (1979) 88 Cal. App.3d 742, 747.)

freedom in any significant way or, as a reasonable person, was led to believe his freedom of movement was restricted by the pressures of official authority." (People v. Blouin (1978) 80 Cal.App.3d 269, 283.)

We must then consider the facts of the instant case in light of the suggested "four factor" test of People v. Herdan (1974) 42 Cal.App.3d 300, 306-307, to determine whether appellant was "in custody" when he made his statement to sheriff's officers on February 21, 1980.

(1) The Site of the Interrogation.

In People v. Herdan, supra, page 307, footnote 9, the court noted that "Usually, interrogation at a police station is deemed inherently coercive, although this is not the case if the suspect comes to the police station on his own initiative or voluntarily. (See People v. Hill (1969) 70 Cal.2d 678, 693-694 . . . .)"

The California Supreme Court has held a defendant's confession inadmissible where the defendant had voluntarily gone to the police station to give a statement and was not Mirandized in two significant cases. (People v. Arnold (1967) 66 Cal.2d 438; People v. White (1968) 69 Cal.2d 751.)

In People v. Arnold, supra, the court recognized that custody constitutes an essential element of the accusatory stage. In Arnold, the defendant was requested by the district attorney to come in for questioning. The district attorney was investigating the death of the defendant's child. The investigation strongly suggested that defendant was responsible for the death of her child. The district attorney did not advise the defendant of her constitutional rights and he contrived a leading question to extract highly incriminating admissions.

The court held in Arnold that the confession was inadmissible. (Id., at p. 450.) The determinative factor in Arnold was not that the defendant was being interrogated at the police station, but rather, that "The deputy district attorney had undertaken a process of interrogation that lent itself to eliciting incriminating statements." (Id., at p. 449.)

In People v. White, supra, the defendant voluntarily accompanied officers to the police station to make a statement about a murder. While he was there, information was obtained which focused suspicion on him. The officer confronted the defendant with the evidence and elicited a confession. The California Supreme Court held that the record showed custodial interrogation, noting that the investigation had focused on the defendant, the officer did not intend

to permit defendant to leave without explaining the evidence, and the officer's remarks were accusatory in tone. (People v. White, supra, 69 Cal.2d 751, 760-761.)

The California Supreme Court has also found a defendant's statements admissible where he had voluntarily gone to the police station to give statements and was not Mirandized. (People v. Hill, supra, 70 Cal.2d 678, 693-694; see also People v. Sam (1969) 71 Cal.2d 194, 201-202.) The United States Supreme Court has also addressed the issue of when a suspect is entitled to Miranda warnings when he voluntarily comes to the police station for questioning. (Oregon v. Mathiason (1977) 429 U.S. 492.)

Appellant in the instant case was interrogated in a small room at a police station. Two other officers were present. As stated above, usually an interrogation

at a police station is deemed inherently coercive. However, this is not always the case, especially if the suspect comes to the police station on his own initiative or voluntarily. Consequently, the issue of whether appellant in the instant case was in custody during the February 21st interview will hinge on the other three factors discussed in People v. Herdan, supra, 42 Cal.App.3d 300.

(2) Whether The Investigation Had Focused On The Suspect

Appellant relies heavily on this factor. As was discussed, supra, the fact that the police investigations had focused on the defendants in People v. White and People v. Arnold, supra, was significant in the court's determination that the defendants in those cases were in custody. Although no longer the sole determinative factor, whether an investigation has

focused on the suspect, is still a significant factor in determining when a suspect is "in custody" for the purpose of Miranda. (People v. Murphy, supra, 127 Cal.App.3d 743, 747-748.)

Not only does appellant contend that he was entitled to Miranda admonitions because the investigation had focused on him prior to the February 21st interview, but he "apparently" contends that he was entitled to have Miranda warnings because there was probable cause to arrest him at the time of his interview. However, the real focus in a Miranda case is not when probable cause to arrest occurs. Probable cause involves both an objective and a subjective standard. The test of custody is not dependent upon the subjective intent of the interrogator. Rather, the fact of probable cause is merely one aspect to consider in determining whether a defendant's

Miranda rights have attached.

> "True, probable cause to arrest, like arrest itself, may play a significant role in the application of the rule but, unlike the case of actual arrest, probable cause to arrest is not in all cases, synonymous with the restraint contemplated by the Miranda doctrine." (People v. Blouin, supra, 80 Cal.App.3d 269, 283.)

The "police" had a substantial amount of information implicating appellant in the attempted robbery-homicide before they interviewed him on February 21st. They knew from Beheler appellant and the two others had discussed robbing the victim at Beheler's home, that appellant had furnished Wilbanks the loaded gun for that purpose, that they then drove to the liquor store to rob the victim of her hashish, and that appellant and Chevez had left after the shooting, "scared." The police had found the gun hidden in Beheler's back yard. They further admitted appellant was a "possible suspect" by

them and had appellant not gone to the sheriff's office voluntarily, a warrant would have been issued for his arrest.

It is clear from the record that the investigation had focused on appellant, among others, before the February 21st interview, and further, the police had sufficient information to constitute probable cause to arrest appellant. In fact, an "all-points" bulletin had already been put out for Wilbanks.

At the interview appellant told the police that they, the four suspects, intended to rob the victim of her hashish, and this was why he obtained his father's gun and gave it to Wilbanks. And yet, even at this point during the interview, the police did not Mirandize appellant.

As discussed above, the "focus or probable cause" factor is no longer dispositive, by itself, of the "in-custody"

issue. However, upon the above facts, it is significant and entitled to great weight.

(3) Whether The Indicia Of Arrest Were Present.

Appellant and Chavez were interviewed in a small interroation room at the police station. Two police officers were present. Appellant was not told he was not in custody or that he was free to leave when he wanted. However, when he gave the second statement after he was arrested and Mirandized, he was asked if he agreed with the statement "You were not in custody at that time." Appellant replied, "That's right." Appellant and Chevez were not arrested at the end of their interview. In fact, the officers furnished them transportation home. However, Chavez and appellant were specifically told not to leave town. In People v. White, supra, 69 Cal.2d 751, the police officer admitted that he did not intend to permit the

defendant to leave the police station without explaining the evidence. On the other hand, in the instant case, Chavez and appellant were permitted to leave the police station following the first interview. Their friend, Beheler, had also given a statement to the police and was permitted to leave. In addition, there was testimony that Chavez and appellant felt they would be able to leave after their interview as well. On balance, and giving substantial weight to appellant's belief at the time that he was not in custody and the fact that he was not arrested at the end of the first interview, we conclude that the indicia of arrest were not present on February 21st.

(4) The Length and Form of Questioning.

Obviously, the longer the interview and the more accusatory in tone the interview is, the more likely a suspect will be

deemed to be in custody pursuant to Miranda. Generally, interrogation pursuant to Miranda refers to questioning or conduct designed or likely to produce incriminating responses. (Rhode Island v. Innis (1980) 446 U.S. 291.)

In the instant case the interrogation of appellant on February 21, 1980, was designed to produce incriminating responses. Before the officers interrogated appellant they knew he was involved in the attempted robbery and/or homicide of the victim. At the beginning of the interview the police immediately began to ask appellant questions regarding the incident. It is apparent from a reading of the transcript that the questions were designed to elicit incriminating responses. For example, at one point during the interview appellant told the officers that he loaned his gun to Danny Wilbanks because he wanted to do some "target practice."

The police officers immediately seized on this and asked appellant, "Well, Jerry Beheler told us that, that the intention of him going over there was to rob her." Appellant's response was, Yeah, yeah, yeah." The officers asked, "That's why he got the gun from you?" Appellant replied, "Yeah, yeah." Continuing, the officers asked, "So he got the gun from you and then you guys all got in the car, went down to the liquor store . . ." Appellant responded, "Yeah." "And Danny's intent was to rob her of her hash?" Appellant responded, "Yeah, just, just, yeah, just to get her hash and that's it."

We conclude that when the police confronted appellant with the evidence they had received from Jerry Beheler this was designed to elicit an incriminating response pursuant to Rhode Island v. Innis, supra. (See People v. White, supra,

69 Cal.2d 751, 760-761.)

As previously stated, the prosecution has the burden of establishing a voluntariness of the defendant's statement beyond a reasonable doubt. (People v. Jimenez, supra, 21 Cal.3d 595. In the instant case there appears to be no conflicting testimony. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753.)

We conclude, from our independent review of the record, that the respondent has not met its burden of establishing the voluntariness of appellant's statement beyond a reasonable doubt. Further, we conclude the incriminating statements from the February 21st interview should have been suppressed by the trial court.

Almost immediately after the shooting here, the police identified the four suspects and interviewed Beheler. He named all the other coparticipants. Based on Beheler's statement, an "all-points" bulletin was immediately put out on Wilbanks and the police immediately went in search of appellant to question him. At the time of the February 21st interview, they had "focused" upon appellant and the others and had probable cause to arrest them. Yet, appellant was not then Mirandized. In the course of the interrogation, by artful questioning and confrontation with Wilbank's statements, appellant confessed to felony murder. A confession has been defined as "amounting to a declaration of defendant's intentional participation in a criminal act." (People v. McClary (1977) 20 Cal.3d 218, 230.) The improper introduction of a confession

is reversible error per se. (People v. Randall (1970) 1 Cal.3d 948, 958.)

In sum, we hold that appellant was in custody during his February 21st interrogation. His statements at this interrogation were wrongfully admitted because he was not advised of his Miranda rights prior to the interview and, as stated above, the wrongful introduction of a confession is reversible error, per se.

II.

Appellant's last contention on appeal is that the trial court erred in failing to instruct the jury in the law of conspiracy. In the instant case it was the prosecution's theory that appellant was an aider and abetter during the attempted commission of the robbery and therefore was liable for the victim's murder on a felony murder theory. It was appellant's theory that the victim's death resulted

from the independent act of a coconspirator.

There is no merit to this argument.

After argument by both sides, the court ruled that it would not give conspiracy instructions. The court apparently felt that since there was no evidence whatsoever that appellant withdrew or abandoned his intent to rob, conspiracy instructions were not mandated.

The court gave CALJIC No. 8127--first degree felony murder--aider and abetter, to the jury. This instruction reads as follows:

> "If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of [robbery], all persons who either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."

In addition, the court gave a special instruction submitted by appellant. This instruction was very similar to CALJIC No. 8.26--first degree felony murder in pursuance of a conspiracy. This special instruction read as follows:

> "If a human being is killed by anyone of several persons engaged in the perpetration of, or attempt to perpetrate the crime of robbery and if the killing is done in furtherance of a common design to commit such crime or if the killing is a natural and reasonable or probable consequence of any act knowingly aided or encouraged by the defendant, then all such persons so jointly engaged are guilty of murder of the first degree whether the killing is intentional, unintentional, or accidental."

The court also gave a special instruction offered by the People. This special instruction read as follows:

> "'A killing' 'in the perpetration of' a robbery attempt need not have been committed for the purpose of perpetrating the robbery; it is sufficient that the two acts, that is, the robbery attempt and the

killing, be part of one continuous transaction. If such is the case, then the killing so committed constitutes a murder in the first degree."

This language comes from People v. Johnson (1972) 28 Cal.App.3d 653, 658. The court also gave CALJIC No. 8.21, first degree felony murder. This instruction reads as follows:

"The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there is in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.

"The specific intent to commit robbery in the commission or attempt to commit such crime must be proved beyond a reasonable doubt."

Appellant contends that his special instruction which contained some of the concepts contained in the conspiracy instructions was negated by the fact that the court also gave CALJIC No. 8.21 and CALJIC No. 8.27, supra. Appellant contends

that "It would seem that with the giving of these conflicting instructions the jurors would be thoroughly confused as to the state of the law."

Appellant seeks to rely on the testimony that he repeatedly said he did not want Danny Wilbanks to use the gun on the victim of the robbery, to absolve his responsibility in the death of the victim. However, there was uncontradicted testimony appellant participated in the planning of the robbery, supplied the lethal weapon to his coparticipant, accompanied his coparticipants to the scene of the crime, and further aided and abetted the crime by assisting in the escape and the disposal of the gun and bullets. While there is evidence appellant did not want Danny Wilbanks to fire the gun, there was no testimony whatsoever appellant ever intended to withdraw from the

underlying crime of robbery. Thus, appellant's contention cannot stand. In addition, appellant's argument that he was precluded from arguing withdrawal is negated by the fact that the court in the instant case gave CALJIC No. 3.02--termination of liability for aiders and abetters. This instruction reads as follows:

> "One who has aided and abetted the commission of a crime, with knowledge of the unlawful purpose of the perpetrator of a crime, may end his responsibility for the crime by notifying the other party or parties of whom he has knowledge of his intention to withdraw from the commission of the crime and by doing everything in his power to prevent its commission."

Thus, appellant's argument fails and the trial court was entirely correct in refusing to instruct the jury on the law of conspiracy.

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For the reasons previously stated, the judgment is reversed and remanded for new trial.

MARTIN
J.*

WE CONCUR:

ZENOVICH
Acting P.J.

HANSON (P.D.)
J.

*Assigned by the Chairperson of the Judicial Council.

APPENDIX B

Copy of Opinion Issued by Fifth District Court of Appeal of the State of California in People v. Beheler, 5 Crim. 5136 (Filed December 16, 1982) and Modification Thereof (Filed January 12, 1983).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,	
Plaintiff and Respondent,	5 Crim. No. 5136
v.	(Superior Court No. 20967)
JERRY LAIN BEHELER,	O P I N I O N
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Kern County. John Michael Nairn, Judge. Reversed.

Quin Denvir, State Public Defender, under appointment by the Court of Appeal, and Julia Cline Newcomb, Deputy State Public Defender, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant

Attorney General, Arnold O. Overoye, Assistant Attorney General, Eddie T. Keller and Janice Rogers Brown, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664, 211 and 187.)

Appellant, Jerry Lain Beheler, and codefendants were charged with violations of Penal Code sections 664, 211 (attempted robbery) and 187 (murder). As a special circumstance, it was alleged that appellant was either engaged in, or was an accomplice to, an attempted robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(i). It was also alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a).

The court granted separate trials for appellant's codefendants. Daniel Chavez,

one of the original codefendants, was granted immunity and testified against appellant.

The jury found appellant guilty on both counts and found the alleged special circumstance and enhancement to be true.

FACTS

On February 20, 1980, appellant, Jerry Beheler, stayed home drinking beer, talking and playing dominoes with some friends. During the day, he and his friends made alternate trips to the nearby Palm Liquor store to buy more beer. On one of these trips, appellant and a friend named Keith were approached in the parking lot of the liquor store by Peggy Dean who asked Keith if he was interested in buying hashish. Appellant testified that he refused Dean's offer as he did not have enough money. After purchasing several quart bottles of malt liquor, appellant and his friend Keith returned home to continue the domino game.

Sometime in the late afternoon, appellant, his step-brother, Danny Wilbanks, and Roscoe Howard drove to Daniel Chavez' house. Chavez and Howard were long-time neighbors and good friends. Chavez had only known appellant for a short time.

Howard and appellant invited Chavez to come over to appellant's house to have a drink and smoke some hash. Appellant said they had bought hash earlier from a lady at the Palm Liquor store and this lady was supposed to meet them at the store in one-half hour with an additional 50 grams.

At appellant's home, Daniel Chavez noticed that Howard had a 357 magnum pistol with him. He recognized the gun as it belonged to Howard's father. While at the house, Chavez, Howard and appellant discussed returning to the liquor store and threatening Peggy Dean with the gun to get the hash. Others testified that appellant

come up with the idea. Chavez testified that he and Howard did not want to threaten Peggy Dean with the gun. They actually discussed several plans for taking the hash. After Chavez, Howard and appellant decided they did not want to do the act, Wilbanks volunteered. Chavez said that appellant was too drunk to do it anyway. Wilbanks got the gun and started flashing it around. He took all the bullets out except one and said he only needed one. Howard told him not to be joking with the gun, took it from him and then reloaded it.

With Danny Wilbanks driving appellant's car, all four men left the house and headed for the liquor store. Chavez was in the front passenger seat. Appellant was in the rear seat behind Wilbanks. Howard sat behind Chavez. Wilbanks, with the gun on his lap, drove into the parking lot on the south side of the liquor store. Two women and a

man were sitting on the bumper poles along the south side of the store. Peggy Dean got up and walked over to the car. She said, "I didn't think you guys were going to show up." She handed Danny Wilbanks a foil-wrapped bindle the size of a marble and told him she had "twelve more in her hand." Ms. Dean leaned in the car window and observed the gun on Wilbanks' lap. She asked what the gun was for. Chavez told her it was for protection. Wilbanks pulled out the gun and pointed it at Ms. Dean and said, "Let me have it all." Ms. Dean recoiled and stepped back from the window and said to Wilbanks, "You're not going to use that on me."

Chavez and Howard urged Wilbanks to leave the place with the one bindle he had. Appellant was still sitting silently in the back seat. Despite the warning, however, Wilbanks pulled the trigger. The bullet struck Peggy Dean just above her right eye,

passed through the soft tissue of the brain and out of the back of her skull. She crumpled to the pavement and a flow of bindles spilled from her hand.

Ms. Dean's companions were still sitting on the curb posts, immobile. A pickup truck pulled into the parking lot and Chavez reached over and turned on the ignition. He told Wilbanks, "Let's get out of here." Wilbanks put the car in gear and drove off. He drove erratically--skidding and stopping--back to appellant's house.

Back at the house, they told appellant's wife about the murder. Wilbanks, while crying, repeatedly stated that he had killed Ms. Dean.

Appellant's memory of the events at the liquor store was quite limited. He remembered hearing a loud report from a gun. He lifted his head in time to catch a glimpse of a gun. Then he saw a woman slowly turn

around and fall to the ground. He did not recall the conversation in the car. He did not remember the drive home. But he did remember arriving back at the house.

Appellant told Wilbanks that he would have to leave. Chavez and Howard told everyone not to mention this to the police, "Nobody knows nobody, man." Chavez and Howard took the gun into appellant's backyard to hide it. They then took off running along the railroad tracks. Howard disposed of the bullets along the way.

Howard and Chavez first went to Chavez' house where Chavez changed his shirt. Then they went next door to Howard's house. Later, they walked to a friend's house and spent the night.

Appellant and his wife went to a neighbor's house and briefly related the story. They called the police who arrived almost immediately. Deputy Lantz, who was

investigating the scene at the Palm Liquor store parking lot, was ordered to respond to the neighbor's residence. Appellant informed him that his brother had killed the woman at the Palm Liquor store parking lot and that the gun was in his backyard somewhere. Appellant gave the officers permission to search his yard and his automobile. The gun was found in the backyard. It was hidden under some leaves and brush and wrapped in a yellow cloth.

Later in the early morning hours of February 21, appellant agreed to go to the sheriff's office for a more detailed interview. In addition, he took the sheriff's officers to the houses on Churchill Drive where Roscoe Howard and Daniel Chavez lived.

At the sheriff's department, appellant gave the investigators a detailed taped statement. The taped statement was

introduced into evidence. Appellant told the officers his half brother, Danny Wilbanks, had shot a woman in the parking lot of the Palm Liquor store. He gave the officers several details regarding the alleged incident. At one point, the taped interview concluded.

The officers then called appellant back into the interview room to ask him some more questions. The officers got appellant to reaffirm that Danny Wilbanks had a 357 magnum gun which he had gotten from Roscoe Howard. The officers asked appellant why he got the pistol from Howard at that time. Appellant responded, "it was for the purpose of robbery." Appellant admitted that the plan was to go down to the Palm Liquor store and take the "dope" away from Peggy Dean. Appellant admitted that he knew the purpose of going to the Palm Liquor store was to rob Peggy Dean of hashish. The officers asked

appellant why he went along with Wilbanks to go rob Peggy Dean. Appellant replied, "I'm his brother. I mean, if there's a way that I knew that I could have kept him from doing what he did I would have done it, if I'd have known that he was fixing to do what he had done I could have prevented it. This was just something that was unforeseen." The officers also got appellant to admit that Roscoe Howard and Daniel Chavez knew about the robbery but that "None of us had any idea that he was going to kill this lady." The officer specifically asked appellant, "But they had an idea that he was going to rob her?" Appellant replied, "Well, they knew that he was going to take her hashish." After the interview, appellant was returned to his home.

Later that day, appellant called Roscoe Howard and Daniel Chavez and convinced them to cooperate with law enforcement

officials. They also agreed to come to the sheriff's office. Their statements were tape recorded.

Several days later, the four men were arrested. Appellant, Howard and Chavez waived their Miranda rights at that time and each gave a second tape-recorded statement substantially corroborating each other.

DISCUSSION

I

Appellant contends that the admission of his tape-recorded statements constitutes reversible error because he was in custody at the time he gave those statements. [1/] He stresses that because suspicion had focused on him at the time of

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1. During the trial, a hearing was held outside the presence of the jury and the court found that the first taped statement "was voluntary and did not need to have a Miranda." Appellant's first non-Mirandized statement was thus ruled admissible as well as his second Mirandized statement made shortly after his arrest.

the first taped statement and the site of the interrogation was at the police station, he "was in custody at the time of his tape recorded interrogations." He contends that the police had probable cause to arrest him at the time of the first taped interrogation. Moreover, he argues that the length and form of questioning "clearly supports a finding of custodial interrogation." We agree.

In Miranda v. Arizona (1966) 384 U.S. 436, 467-473, the United States Supreme Court held that to insure that any statement a suspect makes in a custodial interrogation setting is a product of his free will, the interrogation must be surrounded by certain essential procedural safeguards:

> "[B]efore any questioning begins the police must give the suspect the now-familiar 'Miranda warnings,' advising him primarily of his right to remain silent and to have the assistance of counsel . . .; to be valid, any waiver thereof must be both knowing and intelligent; and the questioning must terminate if the suspect directly or

indirectly invokes any of these rights." (People v. Pettingill (1978) 21 Cal.3d 231, 237.)

The reason for Miranda's requirement of express advisement of rights is to dispel the coercion inherent in an environment of incommunicado-police-dominated interrogation. (Miranda, supra, at pp. 457-458.) The prosecution has the burden of establishing the voluntariness of a defendant's statement beyond a reasonable doubt. (People v. Jimenez (1978) 21 Cal.3d 595.) Absent proof beyond a reasonable doubt of proper advisement and valid waiver of rights, any admission or confession obtained is deemed coerced. (People v. Murtishaw (1981) 29 Cal.3d 733, 753, mod. 29 Cal.3d 836a.) The trial court's ruling on a Miranda issue may not be set aside by an appellate court unless it is "palpably erroneous." (In re Eric J. (1979) 25 Cal.3d 522, 527.) Moreover, as to conflicting testimony, the appellate courts

must accept the version of events most favorable to the People to the extent that it is supported by the record. (People v. Jackson (1980) 28 Cal.3d 264, 300; People v. Jimenez, supra, 21 Cal.3d 595, 609.) However, where the facts are uncontradicted, the reviewing court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753; People v. Jimenez, supra, 21 Cal.3d at p. 609.)

A succinct summary of when the procedural safeguards as set out in Miranda come into play is found in People v. Murphy (1982) 127 Cal.App.3d 743, 747-748:

> "The procedural safeguards set out in Miranda protecting the Fifth Amendment right against self-incrimination come into play only when 'custodial interrogation' is involved. (384 U.S. at p. 444 [16 L.Ed.2d at pp. 706-707]; People v. Farris (1981) 120 Cal.App.3d 51 [174 Cal.Rptr. 424]; People v. Blouin (1978) 80 Cal.App.3d 269, 283 [145

Cal.Rptr. 701].) 'Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."' (Oregon v. Mathiason (1977) 429 U.S. 492, 495 [50 L.Ed.2d 714, 719, 97 S.Ct. 711].) 'While arrest is not a condition precedent to the right to Miranda and Dorado [People v. Dorado (1965) 62 Cal.2d 338, 358-364 (42 Cal.Rptr. 169, 398 P.2d 361)] warnings, custody is: the vice requiring the prophylaxis of the notice of rights is the inherently coercive atmosphere pervading custodial interrogation. [Citation.]' (People v. Leach (1975) 15 Cal.3d 419, 443 [124 Cal.Rptr. 752, 541 P.2d 296].)

"Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Miranda v. Arizona, supra, 384 U.S. at p. 444 [16 L.Ed.2d at p. 706].) In California, it is well settled that custodial interrogation can occur without a formal arrest. It exists where the defendant is either 'physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.' (People v. Arnold (1967) 66 Cal.2d 438, 448 [58 Cal.Rptr. 115, 426 P.2d 515]; People v. Farris, supra, 120 Cal.App.3d at p. 56.) It has been said: 'When an arrest has not yet taken place, the factors considered in deciding whether custody has attached are many. Among the most important are: (1) the site of the interrogation;

(2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.' (People v. Herdan (1974) 42 Cal.App.3d 300, 306-307 [116 Cal.Rptr. 641], fns. omitted; see also People v. Blouin, supra, 80 Cal.App.3d at p. 283; People v. Arnold, supra, 66 Cal.2d at p. 449.)" (Emphasis added.) 2/

Whether appellant was in custody during the initial questioning is the central issue in this case. The test of custody

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2. Prior to Miranda, courts focused on the factor of whether the investigation had begun to focus on a particular suspect. (Escobedo v. Illinois (1964) 378 U.S. 478; People v. Durado (1965) 62 Cal.2d 338.) Since Miranda, however, the test simply is whether the suspect is in custody. Focus on the suspect, however, remains an element in deciding whether custody has taken place. (See People v. Murphy, supra, 127 Cal.App.3d 743, 747-748, and cases cited therein.)

Also, it should be noted that although persons temporarily detained for investigation of crimes are actually deprived of their freedom of movement for the period of the detention, an investigatory on-the-scene detention does not constitute "custody" for the purposes of Miranda. (Miranda v. Arizona, supra, 384 U.S. at pp. 477-478; People v. Patterson (1979) 88 Cal.App.3d 742, 747.)

is not dependent upon the subjective intent of the interrogator. As noted above, the question is "whether the suspect was actually deprived of his freedom in any significant way or, as a reasonable person, was led to believe his freedom of movement was restricted by the pressures of official authority." (People v. Blouin (1978) 80 Cal.App.3d 269, 283.)

We begin our discussion by considering the facts in light of the suggested "four factor" test of People v. Herdan (1974) 42 Cal.App.3d 300, 306-307, to determine whether appellant was "in custody" when he made his taped statements to the sheriff's officers on February 21, 1980.

(1) The Site of the Interrogation.

In People v. Herdan, supra, page 307, footnote 9, the court noted that "Usually, interrogation at a police station is deemed inherently coercive, although this

is not the case if the suspect comes to the police station on his own initiative or voluntarily. (See People v. Hill (1969) 70 Cal.2d 678, 693-694. . . .)"

The California Supreme court has held a defendant's confession inadmissible where the defendant had voluntarily gone to the police station to give a statement and was not Mirandized in two significant cases. (People v. Arnold (1967) 66 Cal.2d 438; People v. White (1968) 69 Cal.2d 751.)

In People v. Arnold, supra, 66 Cal.2d 438, the court recognized that custody constitutes an essential element of the accusatory stage. In Arnold, the defendant was requested by the district attorney to come in for questioning. The district attorney was investigating the death of the defendant's child. The investigation strongly suggested that defendant was responsible for the death of her child. The

district attorney did not advise the defendant of her constitutional rights and he contrived a leading question to extract highly incriminating admissions. The court held in Arnold that the confession was inadmissible. (Id., at p. 450.) The determinative factor in Arnold was not that the defendant was being interrogated at the police station, but rather, that "The deputy district attorney had undertaken a process of interrogation that lent itself to eliciting incriminating statements." (Id., at p. 449.)

In People v. White, supra, the defendant voluntarily accompanied officers to the police station to make a statement about a murder. While he was there, information was obtained which focused suspicion on him. The officer confronted the defendant with the evidence and elicited a confession. The California Supreme Court held that the record showed custodial interrogation, noting that

the investigation had focused on the defendant, the officer did not intend to permit defendant to leave without explaining the evidence, and the officer's remarks were accusatory in tone. (People v. White, supra, 69 Cal.2d 751, 760-761.)

The California Supreme Court has also found a defendant's statements admissible where he had voluntarily gone to the police station to give statements and was not Mirandized. (People v. Hill (1969) 70 Cal.2d 678, 693-694; see also People v. Sam (1969) 71 Cal.2d 194, 201-202.) However, in Hill, the defendant's initial statements to the police were not in reply to questions designed to elicit incriminating responses and in Sam, the defendant was not even a suspect during the first two conversations with the police.

The United States Supreme Court has also addressed the issue of when a suspect is

entitled to Miranda warnings when he voluntarily comes to the police station for questioning. (Oregon v. Mathiason (1977) 429 U.S. 492.) Respondent here relies heavily on this case.

In Mathiason, supra, in response to a telephone call, the defendant, a parolee, voluntarily came to the police station for questioning about a burglary. The state police had investigated a burglary and asked the lady of the house if she suspected anyone. She replied that the defendant was the only one she could think of. The officers tried to contact defendant on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at defendant's apartment with a note asking him to call. The next afternoon, the defendant did call. The officer asked where it would be convenient to meet and the defendant had no preference. The defendant

came down to the police station and was met by an officer in the hallway who shook hands with him and took him into an office. The officer advised him that he was investigating a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The defendant admitted that he had taken the property. At this point, he was advised of his Miranda rights and the officers took a taped confession. At the end of the taped conversation, the officer told the defendant he was not arresting him at this time and that he was releasing him to go about his job and return to his family.

The United States Supreme Court held that Miranda was inapplicable because Mathiason was not "'deprived of his freedom of action in any significant way.'" (Oregon v. Mathiason, supra, 429 U.S. at p. 495.) Respondent appears to contend that Mathiason

should be read for the proposition that anytime a suspect voluntarily comes to the police station to be questioned he would automatically not be in custody for purposes of Miranda. However, upon a close reading of Mathiason, we do not believe this to be the case.

Mathiason does not indicate that the totality of the circumstances should not be considered in determining when a suspect is in custody for purposes of Miranda. Rather, the court in Mathiason looked at all of the facts and concluded that in that case defendant was not in custody per Miranda. Indeed, the facts of Mathiason are quite dissimilar to the case at bar. Unlike the defendant in Mathiason, appellant here was questioned almost immediately after the crimes had occurred. He was extremely emotionally distraught. This was undisputed. On the other hand, the defendant in Mathiason

was not interviewed until 25 days after the burglary and he was not in an emotionally distraught stage. Moreover, the officers in the instant case had a great deal of information, primarily supplied by appellant himself, that appellant was guilty of attempted robbery and first degree felony murder at the time of his interview. On the other hand, the police in Mathiason called the defendant in for questioning because the victim of the burglary, when asked if she suspected anyone, replied that the defendant was the only one she could think of. (Oregon v. Mathiason, supra, 429 U.S. at p. 493.) This is not the same kind of information linking a suspect to a crime as the police had in the instant case. Additionally, the defendant in Mathiason was a parolee and knew it was incumbent upon him to cooperate with police.

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Appellant here was interrogated in a small room at a police station. Two officers were present. As stated above, usually an interrogation at a police station is deemed inherently coercive. However, as can be seen, this is not always the case, especially if the suspect comes to the police station on his own initiative or voluntarily. Consequently, the site of the interrogation factor in determining whether appellant was in custody during the February 21 interview, while relevant, in our opinion is not dispositive. Many factors may have played a part in appellant's decision to come to the police station, not the least of which is the fact that the police failed to inform him of the seriousness of his position. A reading of the record clearly indicates that appellant cooperated with the police feeling that as long as he was not the one who shot the gun he would not suffer serious criminal

liability. In addition, the police seized upon the emotion of the moment and encouraged appellant to talk. He was obviously suffering the effects of alcohol and extremely emotionally distraught. While appellant and his other cosuspects may not have been aware of the felony-murder rule,[3/] indeed, the officers in the instant case most certainly were.

(2) Whether the Investigation had Focused on the Suspect.

As was discussed, supra, the fact that the police investigations had focused on the defendants in People v. White and People v. Arnold, supra, was significant in the court's determination that the defendants in those cases were in custody. Although no longer the sole determinative factor, whether

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3. Indeed, the prosecutor argued to the jury that appellant was ignorant of the rule.

an investigation has focused on the suspect is still a significant factor in determining when a suspect is "in custody" for the purpose of Miranda. (People v. Murphy, supra, 127 Cal.App.3d 743, 747-748.)

Not only does appellant contend that he was entitled to Miranda admonitions because the investigation had focused on him prior to the February 21 interview, [4/] but he contends that he was entitled to have Miranda

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4. Before the officers took appellant to the police station for further questioning, Detective Lanz testified that "we stood in the yard near his doorway for some time discussing the shooting and the circumstances immediately after the shooting." Lanz informed appellant that they would prefer to interview him in depth concerning the circumstances surrounding the shooting at the sheriff's department. Lanz testified he asked appellant if he had any objection and that he explained to appellant he was not under arrest, but that going down to the sheriff's department "would merely facilitate a speedy conclusion to the interview." According to Lanz, appellant agreed to go down to the sheriff's department because "it was his desire to bring the investigation to a conclusion as soon as possible." (Emphasis added.)

warnings because there was probable cause to arrest him at the time of his interview, citing In re James M. (1977) 72 Cal.App.3d 133. However, the real focus in a Miranda case is not when probable cause to arrest occurs. Probable cause involves both an objective and a subjective standard. The test of custody is not dependent upon the subjective intent of the interrogator. Rather, the fact of probable cause is merely one aspect to consider in determining whether a defendant's Miranda rights have attached.

> "True, probable cause to arrest, like arrest itself, may play a significant role in the application of the rule but, unlike the case of actual arrest, probable cause to arrest is not in all cases, synonymous with the restraint contemplated by the Miranda doctrine." (People v. Blouin, supra, 80 Cal.App.3d 269, 283.)

The sheriff's officers in the instant case had a substantial amount of information implicating appellant in the attempted robbery-homicide before they

conducted their first taped interview on February 21. Indeed, they knew from appellant himself that: he and the others had discussed robbing the victim at appellant's home; they drove to the liquor store to rob the victim of her hashish; Wilbanks had fired the fatal shot; the suspects had driven in appellant's car; and the gun was found hidden in appellant's backyard.

Clearly, the officers knew by the time of their first interview with appellant at his home that appellant was involved, at least as an accomplice, in the attempted robbery of Peggy Dean. Likewise, they knew full well that appellant was undoubtedly implicated in the felony murder of Peggy Dean.

From our reading of the record, it is clear that the investigation had focused on appellant, among others, before the

February 21 interview conducted at the police station, and further, the police had sufficient information to constitute probable cause to arrest appellant.

Moreover, the officers initially ended the first taped interview and then called appellant back in. At this point, they specifically interrogated him concerning his knowledge of the plan to rob Peggy Dean and his knowledge of the purpose for the gun. Appellant freely admitted his knowledge and participation in the attempted robbery and yet, even at this point in the interview, the police officers did not Mirandize appellant.

Even though the "focus or probable cause" factor is no longer dispositive, by itself, of the "in-custody" issue, we conclude that on the above facts it is significant and entitled to great weight.

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(3) Whether the Indicia of Arrest Were Present.

Appellant was interviewed in an interrogation room at the sheriff's department. Two officers were present. As mentioned, supra, the officers testified he was told he was not under arrest and the officers believed that he was not "in custody" at the time of the interview. Whether the officers believed that he was in custody or not is irrelevant. Later when appellant gave his second Mirandized statement after he was arrested, he was asked if he agreed with the statement that he was not in custody during the first interview. Appellant stated that he agreed with that assessment. Appellant did not testify at the hearing and his trial counsel did not cross-examine the sheriff's officers on this point. Instead, appellant's trial counsel concentrated on the voluntariness argument

because appellant was extremely emotionally distressed and obviously under the effect, at least to some degree, of alcohol at the time of his interview.

Appellant was permitted to leave at the end of the interview. However, Detective Ray told appellant that he wanted members of the district attorney's office to read the transcribed statements and make a decision as to whether arrest would be made. From the record, we cannot tell whether he was in fact told not to leave Bakersfield.

In our opinion, there was little indicia of arrest present on the February 21 interview other than the fact that the interview took place at the sheriff's station. Thus, we conclude this factor does not balance heavily toward appellant.

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(4) The Length and Form of Questioning.

Obviously, the longer the interview and the more accusatory in tone the interview is, the more likely a suspect will be deemed to be in custody pursuant to Miranda. Appellant's taped interview lasted approximately 30 minutes. Moreover, he had been extensively interviewed at home prior to the interview at the sheriff's department. Generally, interrogation pursuant to Miranda refers to questioning or conduct designed or likely to produce incriminating responses. (Rhode Island v. Innis (1980) 446 U.S. 291.) There is no doubt in the instant case the interrogation of appellant on February 21 was designed to produce incriminating responses. Before the officers interrogated appellant on tape they knew he was involved in the attempted robbery and/or homicide of the victim. Indeed, appellant himself had

supplied that information. It is quite apparent from a reading of the transcript that the questions were designed to elicit incriminating responses. Appellant was asked about the plan to rob Peggy Dean. Appellant was asked about his prior contact with her. Indeed, appellant gave the officers many details regarding the incident in question. Appellant admitted that he knew Wilbanks had a gun. He admitted he knew the purpose was to rob Peggy Dean. He was specifically asked why he went along. Essentially, his response was that if he had known Wilbanks was actually going to use the gun he might have been able to prevent it. In essence, appellant confessed to felony murder.

On this record, we conclude that the form of the questioning of appellant during the February 21 taped interview was designed to elicit an incriminating response pursuant to Rhode Island v. Innis, supra, 446

U.S. 291. Respondent's contention that the questions were merely "investigative in nature, not accusatorial" is totally without merit. (See People v. White, supra, 69 Cal.2d 751, 760-761.)

As we have previously stated, the prosecution has the burden of establishing a voluntariness of the defendant's statement beyond a reasonable doubt. (People v. Jimenez, supra, 21 Cal.3d 595.) In the instant case, there appears to be no conflicting testimony on the Miranda issue. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753.)

We conclude that respondent has not met its burden of establishing that appellant was not in custody during the February 21

interview. Furthermore, the incriminating statements from the February 21 interview should have been suppressed by the trial court. On the record before us, appellant essentially confessed to felony murder during the February 21 interrogation. A confession has been defined as "amounting to a declaration of defendant's intentional participation in a criminal act." (People v. McClary (1977) 20 Cal.3d 218, 230.) The improper introduction of a confession is reversible error per se. (People v. Randall (1970) 1 Cal.3d 948, 958.) 5/

Because of our decision on the Miranda issue, we find it unnecessary to address appellant's numerous other contentions at this time. These issues are

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5. This court recently reversed the conviction of Roscoe Howard, one of appellant's original codefendants. (People v. Howard (July 16, 1982) 5 Crim. No. 5181, hg. den.) The reversal was based on an almost identical Miranda violation.

either currently pending in the California Supreme Court, or are unlikely to arise again in any subsequent retrial of appellant.

For the reasons previously stated, the judgment is reversed and remanded for a new trial.

ZENOVICH
J.

WE CONCUR:

FRANSON
Acting P.J.

QUALL
J.*

* Assigned by the Chairperson of the Judicial Council.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,	5 Crim. 5136
Plaintiff and Respondent,	(Super. Ct. No. 20967)
v.	
JERRY LAIN BEHELER,	MODIFICATION OF OPINION ON DENIAL OF REHEARING
Defendant and Appellant.	

The opinion filed herein on December 16, 1982, is modified as follows:

On page 3, line 6, "Chavez testified" should be added after first full sentence and "However, appellant testified he refused the lady's offer as he did not have enough money" should be added at the end, so that the second paragraph on page 3 reads:

"Howard and appellant invited Chavez to come over to appellant's house to have a drink and smoke some hash. Chavez testified appellant said they had bought hash earlier from a lady at the Palm Liquor store and this lady was supposed to meet them at the store in one-half hour with an additional 50 grams. However, appellant testified he refused the lady's offer as he did not have enough money."

On page 21, the sentence should be stricken and the following inserted in its place:

"The judgment is reversed and remanded for a new trial charging appellant with no offenses greater than voluntary manslaughter. (See People v. Taylor (1974) 12 Cal.3d 686.)

The petition for rehearing is denied.

ZENOVICH
j.

I CONCUR:

FRANSON
Acting P.J.

APPENDIX C

Copy of Petition for Hearing to the Court of the State of California in People v. Beheler, 5 Crim. 5136 (F000633) (Dated April 30, 1984)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	Crim. _____
Plaintiff and Respondent,	)	5 Crim. No. 5136 (F000633)
v.	)	(Super. Ct.No. 20967)
JERRY LAIN BEHELER,	)	
Defendant and Appellant.	)	

PETITION FOR HEARING

OFFICE OF THE
STATE PUBLIC DEFENDER

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JERRY LAIN BEHELER, Defendant and Appellant.	Crim. No. _____ 5 Crim. No. 5136 (F000633) (Super. Ct.No. 20957)

PETITION FOR HEARING

TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The petitioner, Jerry Lain Beheler, respectfully petitions this Honorable Court for a hearing after the decision of the Court of Appeal, Fifth Appellate District, affirming and modifying petitioner's conviction to voluntary manslaughter. A copy of the published decision, filed March 19, 1984, is attached hereto as Exhibit A. A copy of the

denial of Mr. Beheler's petition for rehearing is attached hereto as Exhibit B.

Petitioner requests this Court to grant hearing and remand petitioner's case to the Fifth District Court of Appeal in light of today's decision by the United States Supreme Court in a co-defendant's case. Petitioner is entitled to reconsideration by the Court of Appeal regarding the proportionate punishment for him, since a more culpable co-defendant has received a lighter disposition, and the appellate court relied on People v. Dillon (1983) 34 Cal. 3d 441.

NECESSITY FOR HEARING AND REMAND

On Monday, April 30, 1984, the United States Supreme Court denied the State of California's petition for writ of certiorari in the case of California v. Howard 82-976. Mr. Howard was a convicted co-defendant of Petitioner Beheler. Both Mr. Beheler and Mr. Howard received reversals of their convictions by the Fifth District Court of Appeal in 1982 on the same ground, to wit: failure of the state to advise them of Miranda rights. (Ex. "A", Opn. p. 9 fn. 4.) However, the United States Supreme Court treated these two defendants disparately. The state's petition for certiorari was granted in petitioner's case and his reversal was summarily over-turned by the United States Court. (California v. Beheler (82-1666) (1983) ____U.S.____; 77 L.Ed.2d 1275.)

Today's action by the United States Court creates yet another inequity in this case. Briefly, four men were charged with capital

felony-murder in Bakersfield, They had driven to a liquor store to steal some hashish from a woman in the parking lot. By all accounts petitioner was so drunk that he was virtually passed out in the back seat (see Ex. "A" 21-24). Mr. Willbanks was also inebriated, but not as severely as Mr. Beheler. Mr. Willbanks drove the car to the location, and wantonly killed the woman. The two men in the car who were not intoxicated were Mr. Chavez, who received total immunity, and Mr. Howard.

Upon learning of the crime, Mr. Beheler immediately contacted law enforcement. He asked them to come to his home, he told them everything he knew, he showed them the car, the gun. He drove in the patrol car to the other co-defendants' houses, knocked at the door and tried to convince them to answer police questions. He was taken to the station and interrogated on a tape recorder. He was released at approximately 3 o-clock a.m., having confessed to

vicarious felony-murder without ever being informed about his own potential criminal liability, and without being advised per Miranda. Thereafter, he further assisted the police by persuading Chavez and Howard to turn themselves in.

Mr. Beheler went to trial first. He presented a valid diminished capacity defense. However, delivery of the faulty instruction on aiding and abetting (vicarious liability) prevented the jury from reaching or deciding the question of his mental state (see People v. Beeman (1984) 35 Cal.3d 547). He was convicted and sentenced to life without parole.

Mr. Howard was also convicted and similarly sentenced.

However, the direct perpetrator who relied upon diminished capacity (utilizing the same expert witness) received a verdict of voluntary manslaughter as a lesser included offense. The perpetrator's diminished capacity defense was

not obviated by delivery of the Beeman instruction.

The Fifth District Court of Appeal reversed both petitioner's and Howard's convictions and life without parole sentences due to Miranda violations. The state sought hearing in both, and sought certiorari in both.

Last year the United States Court overturned petitioner's reversal and remanded the case to the Fifth District Court of Appeal. The United States Court did not act on the Howard petition until today.

In the meantime, the Fifth District Court of Appeal considered petitioner's case anew. Since Howard's case was still pending, the Fifth District Court of Appeal probably assumed that it would be remanded in light of California v. Beheler, supra. The Court of Appeal considered all of the factors in petitioner's case, compared the facts with the culpability of other involved parties and determined that this was one of those rare cases in which the judgment

should be reduced to no more than the voluntary manslaughter conviction received by the direct perpetrator.

However, today we learn that Mr. Howard's reversal of conviction has been upheld by the United States Court. Mr. Howard possessed and supplied the murder weapon. Mr. Howard was not under the influence of alcohol. Mr. Howard did not attempt to assist law enforcement in every way he could. Instead, Mr. Howard buried the gun, threw away the bullets, and hid from the police for several days. The state has repeatedly announced that no theory exists for prosecuting the aiders and abettors to felony-murder with any crime less than felony-murder. (See Petition for Hearing by respondent below, filed April 25, 1984.) Yet Mr. Howard cannot be retried for felony-murder due to collateral estoppel principles. (People v. Taylor (1974) 12 Cal.3d 686.)

Thus, the result is that the Fifth District Court of Appeal has been denied the opportunity to consider the proportionality impact of a complete reversal for one confederate who was more mentally responsible for his own participation, and who did far less to remedy the situation. In other words, this Court should grant hearing in this case and remand it to the Fifth District Court of Appeal for reconsideration in light of the lenient disposition received by a more culpable co-defendant. Under the Dillon analysis employed by the Fifth District Court of Appeal, this information is critically relevant. (People v. Dillon (1983) 34 Cal.3d 441.)

Petitioner argued on appeal that (1) his conviction should be reversed due to delivery of CALJIC 3.01 (Beeman) in this specific-intent, felony-murder case, (2) his conviction should be reversed because he was in custody for Miranda purposes under independent state con-

stitutional grounds, (3) and also that under Dillon he should be convicted of nothing greater than involuntary murder since voluntary murder requires express intent to kill, and as an aider and abettor Mr. Beheler would have had to at least know, if not share, the perpetrator's intent to kill. The state offered no evidence whatsoever that Petitioner Beheler knew of, let alone shared, the perpetrator's intent to kill.

Thus, the Court of Appeal's decision that petitioner's judgment should be reduced to voluntary manslaughter, instead of involuntary, may be substantially impacted by the more culpable co-defendent's lenient treatment.

As a result, in order to secure uniformity of opinion and proportionality of punishment, this Court should grant hearing and remand this case to the Fifth District Court of Appeal for reconsideration of petitioner's judgment in light of the fact that a more culpable co-defendant has received a complete reversal wherein the state has no theory for retrial.

CONCLUSION

In conclusion, this Court should grant hearing and remand this case to the Fifth District Court of Appeal for reconsideration in light of the lenient treatment ultimately received by a more culpable co-defendant as a result of the United States Supreme Court's disparate treatment of the two cases.

DATED: April 30, 1984

Respectfully submitted

OFFICE OF THE
STATE PUBLIC DEFENDER

JULIA CLINE NEWCOMB
Deputy State Public Defender

Attorney for Petitioner Beheler

Supreme Court, U.S.
FILED
JUL 18 1984
ALEXANDER L. STEVAS
CLERK

No. 82-976

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner

vs.

ROSCOE HOWARD JR.,

Respondent.

OPPOSITION TO PETITION

FOR REHEARING

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IN THE SUPREME COURT OF THE

UNITED STATES

PEOPLE OF THE STATE OF CALIFORNIA

Petitioner

vs.

ROSCOE HOWARD JR.,

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   REHEARING OF THIS CASE AND CONTINUED INCARCERATION OF DEFENDANT FRUSTRATES JUSTICE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

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No. 82-976

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner

vs.

ROSCOE HOWARD JR.,

Respondent.

OPPOSITION TO PETITION

FOR REHEARING

The Attorney General of the State of California seeks rehearing of this Court's April 30, 1984, denial of their petition for writ of certiorari. Petitioner claims that a rehearing of this matter would promote the interests of justice. Petitioner argues that respondent's co-defendant

Beheler, the subject of this Court's opinion in California vs. Beheler 103 S. Ct. 3519; 77 L. Ed 2d at 1275, might use this court's denial of certiorari to "Further artificially deflate this sentence."

The California Supreme Court let the air out of the California Attorney General's position in Carlos vs. Superior Court 35 Cal. 3d 131 (1983). Pursuant to the decision co-defendant Beheler was released from custody on June 18, 1984. A Certified Copy of the Superior Court minute order of Beheler's release from custody is attached as an exhibit.

Basically the California Supreme Court reasoned that the finding of special circumstances and the imposition of the death penalty or life without possibility of parole upon an accomplice who did not intend a killing would probably constitute cruel and unusual punishment. The California Supreme Court construed the state's

death penalty statute to include a requirement that defendant intended to kill. Carlos vs. Superior Court, supra at 153.

Irrespective of the Miranda issue, accomplice Beheler could only be tried for voluntary manslaughter since the perpetrator Wilbanks was the actual killer and was convicted by jury of voluntary manslaughter. Howard is in the same position as Beheler. Howard had no intent to kill nor did Howard assist in killing. Upon remand Howard can only be held culpable for the crime of voluntary manslaughter. Howard has served his time for the offense.

By inference the California Supreme Court in Carlos indicated that a death penalty statute which imposed the extreme penalties of death or life without possibility of parole for non-intentional killings would violate the cruel and unusual punishment clause of the Eighth Amendment. In part the Carlos decision is based upon this Court's

opinions in Edmund vs. Florida 458 U.S. 782; 102 S. Ct. 3368 (1982) and Coker vs. Georgia 433 U.S. 584; 97 S. Ct. 2861 (1977).

The ends of justice are served by denial of rehearing. "Ethical principles that punishment should be proportionate to individual guilt, and that a less culpable offender should not be punished more severely than a more culpable offender" are accepted principles of justice. Carlos vs. Superior Court supra. at 134

At the time of trial the jury hearing, the killer Wilbank's case, received instructions on degrees of murder and manslaughter. The jury convicted the shooter Wilbanks of voluntary manslaughter. At the separate trials of accomplices Howard and Beheler, the case was submitted to the trial jury on a theory of first degree murder with special circumstances. The trial jurors were not told that the penalty for conviction was life without possibility of parole.

Common sense dictates that justice is not served if accomplices Beheler and Howard are punished more severely than the killer Wilbanks.

CONCLUSION

Petitioner's request for rehearing should be summarily denied.

Dated: July 19, 1984 RESPECTFULLY SUBMITTED,

EUGENE R. LORENZ
Attorney for Respondent.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

DATE: Monday, June 18, 1984 COURT MET AT 8:30 A.M. DEPARTMENT NO. 5

PRESENT: HON: JOHN M. NAIEN, JUDGE N. E. Limi, DEPUTY CLERK

Edyne Kenney, REPORTER S. Williams, BAILIFF

TITLE:	COUNSEL:
PEOPLE OF THE STATE OF CALIFORNIA vs. JEFFY LAIN BEHELER	Stephen Tauzer, Deputy District Attorney Julia Newcomb, Deputy State Public Defender

NATURE OF PROCEEDINGS: ACTION NO. 20967

RE-SENTENCING PER REMITTITUR
FELONY, TO WIT: 1. PC 664-211 with PC 12022(a)
2. PC 192.1

Elizabeth Gosling, Deputy Probation Officer present.

The above entitled cause came on regularly at this time today for re-sentencing with the Defendant and Counsel present in open Court as underlined above.

Cause is duly argued. The Court has read and considered the Probation Officer's Report. No legal cause.

Sentence: Count 2 - PC 192.1: Probation denied. Defendant sentenced to State Prison for the mid-term of 4 years.

Count 1 - PC 664-211 with PC 12022(a): Probation denied. Defendant sentenced to State Prison for the mid-term of 2 years plus one year for enhancement PC 12022(a). Term on Count 1 is stayed until completion of term on Count 2 and permanently thereafter.

Defendant sentenced to State Prison for TFT 4 years with credit for time served 1005 actual days.

The Court finds that the defendant has served his term in full. The Court finds that the defendant has served time in excess of term imposed and parole per PC 1170 (a)(2). Defendant not placed on parole.

Defendant ORDERED released from custody this date. Release issued.

ATTACHMENT

MINUTES

BEST AVAILABLE COPY

No. 82-976

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner

vs.

ROSCOE HOWARD JR.,

Respondent.

PROOF OF MAILING--AFFIDAVIT

I, EUGENE R. LORENZ, the attorney for Roscoe Howard Jr., respondent herein, hereby certify that on the 19th day of July, 1984, I deposited in the United States Post Office located at 1730 18th Street, Bakersfield, California, first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Opposition to Petition For Rehearing.

EUGENE R. LORENZ
Attorney for Respondent.

Subscribed and Sworn to before me at Bakersfield, California, this 19th day of July, 1984.

Anna M. Bates
ANNA BATES, Notary Public
State of California.

OFFICIAL SEAL
ANNA M. BATES
NOTARY PUBLIC - CALIFORNIA
KERN COUNTY
My Comm. Expires Jan. 12, 1987

FILED
AUG 31 1984
ALEXANDER L. STEVAS
CLERK

8205

No. 82-976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROSCOE HOWARD, JR.,

Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR REHEARING UPON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

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No. 82-976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROSCOE HOWARD, JR.,

Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR REHEARING UPON DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

ARGUMENT

RESPONDENT'S IRRELEVANT OPPOSITION COMPLETELY IGNORES THE ARGUMENTS ADVANCED IN THE PETITION FOR REHEARING

In the petition for rehearing filed in this matter, it was argued that respondent's first degree murder conviction should be

upheld pursuant to California v. Beheler (1983) ____U.S._____, 103 S.Ct. 3517, 77 L.Ed.2d 1275 and that a reversal of respondent's conviction could further result in reducing the punishment of respondent's accomplice, Jerry Beheler. Respondent's opposition totally ignores these arguments and instead submits that it would now be unfair to uphold his murder conviction since his accomplices, Willbanks and Beheler, were only punished for voluntary manslaughter. 1/ Respondent's claim is completely irrelevant

1/ To the extent that this contention might be based on "collateral estoppel", it has already been rejected by this Court in California v. Beheler, supra, 103 S.Ct. at 3520 fn. 3, 77 L.Ed.2d at 1280 fn. 3. Moreover, given the appropriate opportunity, petitioner submits that California courts would also reject such an argument. (See, e.g. People v. Mata (1978) 85 Cal.App.3d 233, 237; People v. Hernandez (1971) 18 Cal.App. 3d 651, 657; People v. Collins (1966) 242 Cal.App.2d 626, 634; People v. Massie (1953) 122 Cal.App.2d 235, 236; see also People v. Taylor (1974) 12 Cal.3d 686, 697 fn. 13.) Respondent completely misconstrues the California Supreme Court's opinion in Carlos v. Superior Court (1983) 35 Cal.3d 131, if he means to imply that a "collateral estoppel-type" doctrine would apply in his case.

and misleading. 2/

The issue in this case is not whether respondent should be punished for murder or

2/ Despite the patent irrelevancy of respondent's opposition, petitioner wants to set the record straight concerning the recent disposition of the Beheler case and its possible impact on respondent's ultimate sentence. Contrary to respondent's insinuation, Beheler's first degree murder conviction was not reduced to voluntary manslaughter simply because the triggerman Willbanks was only convicted of the lesser homicide. Rather, the Fifth District Court of Appeals reviewed the "totality of the circumstances" pursuant to the proportionality analysis enunciated by the California Supreme Court in People v. Dillon (1983) 34 Cal.3d 441. The court reduced Beheler's conviction to voluntary manslaughter. Upon remand, Beheler was resentenced to the "middle term" of four years, as opposed to the "upper term" of six years, and was promptly released. However, in direct contrast to respondent's argument, the reviewing court intimated that respondent could very well receive a higher sentence (second degree murder) since "it could be argued that Howard was more culpable than Beheler because Howard provided the murder weapon and was not as inebriated as Beheler." (People v. Beheler, infra, 153 Cal.App. at 259, 200 Cal.Rptr. at 1205.) Furthermore, even if respondent's conviction was modified to voluntary manslaughter, he might very well receive an "upper term" rather than a "middle term". Finally, no showing has been made that respondent would receive the same credits on his sentence as Beheler. Thus, there is no basis for concluding that respondent has already served his entire sentence. No determination of that can be made unless this Court grants the petition for rehearing and upholds respondent's conviction.

manslaughter. That is a determination for the California courts. (People v. Dillon (1983) 34 Cal.3d 441; People v. Laboa (1984) 158 Cal. App.3d 115; see also People v. Beheler (1984) 153 Cal.App.3d 242, 200 Cal.Rptr. 195 (ordered depublished on May 17, 1984). 3/

The question before this Court is whether respondent will stand convicted of any crime at all. As it stands now, his conviction for murdering Peggy Dean has been completely reversed and a crucial piece of prosecution evidence, respondent's confession, has been suppressed.

Respondent's opposition makes no effort to counter petitioner's argument that his confession should be admitted and his conviction upheld pursuant to California v. Beheler, supra. Nor does he rebut the fact that Jerry Beheler has tried to take advantage of this Court's initial order denying certiorari to seek a further reduction of his already anematized

3/ Generally, unpublished opinions cannot be cited as authority in California. (Cal. Rules of Court, rule 977.)

sentence. Although Beheler is now a "free" man, it cannot be said that he will not rely on the vagaries of California law to attempt to reduce or remove the various disabilities and penalties that are attached to his status as a felon convicted of voluntary manslaughter. (See, e.g. Cal.Pen. Code §§ 667 et seq., 1192.7(c), 1385, 4800 et seq.)

Petitioner agrees with respondent on one point -- he should be treated the same as Jerry Beheler. It is undisputed that both respondent and Beheler agreed to be interviewed and subsequently confessed to murdering Peggy Dean during a police contact in which no "indicia of arrest" were present. Just as this Court ruled that Beheler's confession should be admitted as evidence, it should now so rule in respondent's case. Just as Beheler's murder conviction was upheld, so should be respondent's. Uniformity of

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decision and the interests of justice require that the petition for rehearing be granted.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

EDDIE T. KELLER
Deputy Attorney General

WARD ALLEN CAMPBELL
Deputy Attorney General

Attorneys for Respondent